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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSEPH P. FERRY, PETITIONER

v.

DEPARTMENT OF THE NAVY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employee of an agency which arbitrarily and unreasonably terminated his employment should receive attorney fees and expenses under the Equal Access to Justice Act after his appeal to the federal courts to reverse the capricious actions of the agency resulted in his reinstatement with back pay?

2. Whether an employee who made a good faith effort to comply with the agency regulations as explained to him by agency personnel should be denied attorney fees under a narrow construction of the interest of justice standard of the Back Pay Act, which Congress intended to be widely applicable?

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1. Whether an employee of an agency which arbitrarily and unreasonably terminated his employment should receive attorney fees and expenses under the Equal Access to Justice Act after his appeal to the federal courts to reverse the capricious actions of the agency resulted in his reinstatement with back pay?

2. Whether an employee who made a good faith effort to comply with the agency regulations as explained to him by agency personnel should be denied attorney fees under a narrow construction of the interest of justice standard of the Back Pay Act, which Congress intended to be widely applicable?

Joseph P. Ferry petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, No. 87-3507, affirming the denial of the petition for review by the MSPB is not reported (A. 1)[1]. The opinion of the MSPB affirming the denial of attorney fees by the Administrative Judge is unreported (A. 5). The decision of the Administative Judge denying attorney fees is unreported (A. 7). The opinion of the MSPB granting petitioner's back pay order is reported at 32 MSPR 63 (A. 21). The decision of the Administrative Judge reversing the removal decision is unreported (A. 29). The opinion of the Court of Appeals vacating

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[1] A. _____ references are to pages of the separately bound Appendix of the Petitioner.

the MSPB's removal decision is unreported, 785 F.2d 322 (A. 41). The decision of the MSRB affirming petitioner's removal is unreported, 26 MSPR 422 (A. 48).

JURISDICTION

The judgment of the Court of Appeals (A. 1) was entered on March 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 203 of the Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2325 as revised and amended Section I of Pub. L. No. 99-80, 99 Stat. 183 (1985) and amended by Section 6103(c) of Pub. L. No. 99-509, 100 Stat. 1948 (1986), codified at 5 U.S.C. (1982 ed., Supp. IV) 504 provides in relevant part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses

incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

. . .

(b)(1) For the purposes of this section --

. . .

(C) "adversary adjudication" means (i) an adjudication under Section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31;

. . .

2. Section 554 of the Act of September 6, 1966, Pub. L. No. 89-554, 80 stat. 384 as amended by Section 2(a)(1) of Pub. L. No. 95-251, 92 stat. 183 (1978), codified at 5 U.S.C. (1982 ed., supp. IV) 554 provides in relevant part:

> (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved --
>
> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
>
> (2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;
>
> (3) proceedings in which decisions rest solely on inspections, tests, or elections;
>
> (4) the conduct of military or foreign affairs functions;
>
> (5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

. . .

3. Sections 2 through 4 of the Back Pay Act of 1966, Pub. L. No. 89-380, 80 stat. 94, 95 as amended by section 2306 of Pub. L. No. 96-465, 94 stat. 2165 (1980) and by section 702 of Pub. L. No. 95-454, 92 Stat. 1216 (1978), codified at 5 U.S.C. (1982 ed., supp. IV) 5596 provides in relevant part:

> (a) For the purpose of this section, "agency"means --
>
> (1) an Executive agency;
>
> (2) the Administrative Office of the United States Courts;
>
> (3) the Library of Congress;
>
> (4) the Government Printing Office; and
>
> (5) the government of the District of Columbia.
>
> (b)(1) An employee of an agency who, on the basis of a timely appeal of an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under

applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title 1 of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

. . .

4. Section 7701 of the Act of September 6, 1966, Pub. L. No. 89-554, 80 stat. 530 as amended by Section 2, Pub. L. No. 96-54, 92 stat. 1138 (1979), codified at 5 U.S.C. (1982 ed., supp. IV) 7701 provides in relevant part:

> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule or regulation. An appellant shall have the right --
>
> (1) to a hearing for which a transcript will be kept; and
>
> (2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board.
>
> (b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hear-

ing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision --

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any

prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

. . .

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

. . .

5. Section 205 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 stat. 1143 as amended by Section 144, Pub. L. No. 97-164, 96 stat. 45 (1982), codified at 5 U.S.C. (1982 ed., supp. IV) 7703 provides:

> (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.
>
> (2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.
>
> (b)(1) Except as provided in paragraph (2) of the subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other pro-

vision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

6. Section 204 of the Equal Access to Justice Act of 1980, Pub. L. No. 96-481, 94 Stat. 2327, 2329, as amended by Section 2 of Pub. L. No. 99-80, 99 Stat. 184, 186 (1980), codified at 28 U.S.C. (1982 ed., supp. III) 2412 provides in relevant part:

. . .

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.
>
> . . .
>
> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any

costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than .cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

. . .

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of Section 504 of Title 5, United Stated Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the Unites States was substantially justified, or that special circumstances make an award unjust.

STATEMENT

Petitioner was a civilian employee of the Department of the Navy at the Phila-

delphia Naval Shipyard, and sustained injuries in a work related accident on June 1, 1983. Subsequent to and as a direct result of this work injury, petitioner was disabled and therefore did not return to work for several months. Effective May 5, 1984, petitioner was removed for excessive unauthorized absence (AWOL) [for the period beginning July 15, 1983 and ending March 6, 1984] and for violating the agency's regulations relating to notifying the agency of his reasons for the absences.

A hearing was held on August 3, 1984 at which time the MSPB Presiding Official heard testimony and accepted evidence on both charges. At this hearing, the agency could not produce the regulation which was allegedly violated, and with respect to the AWOL charge, the record was closed before the final decision of the Depart-

ment of Labor (regarding the work disability claim) was available. Notwithstanding these issues at the hearing, the Presiding Official who heard the case for the Merit Systems Protection Board (MSPB) sustained the removal as to both charges by a decision rendered on September 20, 1984. On appeal, the MSPB sustained the removal without opinion, by decision rendered January 15, 1985. In a related case, an initial determination of the U.S. Department of Labor found that petitioner was not eligible for benefits, but in August of 1985, after a hearing, reversed its earlier decision and found that petitioner was disabled and entitled to worker's compensation benefits for the period June 1, 1983 through January 24, 1984, the time required for petitioner to recover fully from the work injury. On appeal of the MSPB removal proceeding, the Federal Circuit Court of Appeals [Ferry v.

Department of the Navy, 785 F.2d 322 (Fed. Cir. 1985) (unpublished)], vacated the decision of the MSPB and remanded the case for consideration of the effect of the Department of Labor decision and the impact of the failure of the agency to produce the regulation which petitioner was charged with violating, which regulation the agency was still unable to produce for the appeal. (A. 79-80).

Upon reconsideration at a hearing held on February 28, 1986, petitioner's penalty was mitigated. The parties stipulated that the agency would no longer consider petitioner AWOL through January 23, 1984, the date when the Department of Labor considered petitioner to be fully recovered. (A. 81-89). The issue of whether petitioner violated agency regulations was withdrawn, by stipulation of both parties. (A. 84-85). The agency proposed an eight

(8) day suspension (A. 85) and petitioner did not object, based upon reasons set forth in the testimony of petitioner, submitted by affidavit at the hearing. (A. 90-92). Petitioner was then reinstated to his job on March 28, 1986, nearly three years after his initial absence.

Thereafter, counsel for petitioner filed a timely motion seeking an award of attorney fees and expenses (A. 93-101), either under the Equal Access to Justice Act (EAJA) or for fees under the Back Pay Act (BPA). The agency filed its opposition to the petition for attorney fees. The Administrative Judge denied the motion for attorney fees in a decision rendered August 13, 1986.[2] (A. 7). The Judge decided the fees were "incurred" and that

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[2] The same Presiding Official denied this motion who had sustained the petitioner's removal. The removal decision was later vacated by the Federal Circuit Court and reversed on remand.

the petitioner was the "prevailing party". Once having cleared these hurdles though, the Judge went on to hold that attorney fees were not warranted in the "interest of justice". (A. 11-19). The Judge decided that although the petitioner had originally been charged with violating a regulation which the Agency never produced the Judge did not consider this issue in relation to attorney fees because the parties stipulated that the issue should be withdrawn from consideration.(A.84-85).

A petition for review from this Order was timely filed by the petitioner, (A. 102-111), and answered by the agency, (A. 112-121). The MSPB affirmed the Order denying attorney fees without opinion, in a 2 to 1 decision rendered July 8, 1987.

A timely petition for review was filed by the petitioner with the Court of

Appeals for the Federal Circuit. The Federal Circuit Court affirmed the MSPB opinion in a decision rendered March 21, 1988. (A. 1-4). The Federal Circuit Court agreed that petitioner was the "prevailing party" but denied fees on the grounds that it was not warranted in the "interest of justice". Specifically, the Court decided that petitioner was not substantially innocent of the charges. The Court did not address the requirements of the Equal Access to Justice Act.

Federal jurisdiction in the Circuit Court of Appeals for the Federal Circuit was based on 28 U.S.C. §1295 and 5 U.S.C. §7703 (provision for appeals to be taken from decisions of the Merit Systems Protection Board).

REASONS FOR GRANTING THE PETITION

This case presents an important conflict among the federal circuit courts over the applicability of the Equal Access to Justice Act provisions for awarding attorney fees. Some circuit decisions have held that attorney fees can not be granted in appeals from government agency proceedings. Other decisions have held that attorney fees can be recovered for proceedings against agency decisions from the initial proceedings to the final appeal. Still other circuits have decided that attorney fees may only be granted for appeals to the courts, not for proceedings before the agency. This split creates uncertainty as to the appropriate standard to be used in determining whether fees should be granted. Further complicating the matter, the standard under the EAJA has been construed by one circuit to require clearly reasonable behavior by the

government agency and by other circuits as only requiring reasonableness. Consequently, petitioners who deserve fees for their efforts in challenging arbitrary bureaucratic behavior must pay their own fees and are deterred from challenging capricious governmental behavior. Even if fees are awarded under the Back Pay Act, the petitioner is still personally responsible for expenses. Until the correct application of the EAJA attorney fees provisions is determined, potential litigants who have meritorious claims against an obstinate and entrenched bureaucracy are being deterred by the prospect of large fees and expenses which they would have to pay to vindicate themselves.

Even under the Back Pay Act, the awarding of attorney fees has been inconsistent and narrowly circumscribed.

Congress intended this act to allow employees who were wronged by an agency to have the wherewithal to challenge government actions. Instead, fees have been awarded only under certain prescribed and very limited conditions. The MSPB and the courts have been reluctant to award fees and some deserving employees have been denied fee awards. The begrudging allowance of fees only in some cases where the employee has been grossly wronged disserves the intent of Congress. Employees who must struggle against an agency which refuses to concede erroneous positions will be deterred by the difficulty of allowing a fee award. A less restrictive standard which will allow fees to be awarded to employees who prevail against arbitrary agency actions is necessary to encourage employees to assert their rights and assist in controlling a recalcitrant bureaucracy.

1. The circuit courts have interpreted the applicability of the EAJA attorney fees provisions in several different ways. The D.C. Circuit Court in Hoska v. United States Department of the Army, 694 F.2d 270(D.C. Cir. 1982) at p. 273 decided that the EAJA was not applicable to any of the proceedings in challenging the Army's actions. Although U.S.C. 28 §2412(d)(3) allows attorney fees in actions for review of an adversary adjudication,[3] 5 U.S.C. §554(a)(2) excludes from the category of adversary adjudication those matters dealing with selection or tenure. The court strictly applied this provision and allowed no recovery under the EAJA. The D.C. Circuit Court failed to consider the clear language of 28 U.S.C. §2412 (d)(3) authorizing a court to award fees and expenses "in any action for judicial review of an

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[3] Adversary adjudications are defined in 5 U.S.C. §504(b)(1)(C).

adversary adjudication" in administrative proceedings to the same extent as provided for by 5 U.S.C. §504. This bypasses the restrictions of 5 U.S.C. §554. This unduly restrictive interpretation deters employees from pursuing meritorious claims. It is contrary to the wording of the statutes and the intent of Congress.

The Federal Circuit Court has interpreted the same statutory provisions to allow recovery of fees and expenses in appeals to the courts, but not before the MSPB or in the agency appeals procedure. In Gavette v. Office of Personnel Management, 808 F.2d 1456 (Fed. Cir. 1986), at p. 1459, the Court decided that the EAJA provisions allowing recovery of fees and expenses at 28 U.S.C. §2412(d)(1) were separate and distinct from the provisions of Section 504 of 5 U.S.C. The Court reasoned that 5 U.S.C. §554 dis-

allowing fees for employee adverse adjudications dealing with tenure applied only to §504 of 5 U.S.C. Gavette, 808 F.2d at 1460. This distinction is clearly valid. 5 U.S.C. §504 refers to administrative proceedings. 28 U.S.C. §2412 applies to civil actions. These civil actions include those for judicial review of agency actions. It is important to establish the availability of fees and expenses in the courts. Those who proceed through the administrative appellate procedure should not be deterred from appealing adverse decisions. Very often an administrative body may be subtlely influenced or biased by the agency which has complaints registered against it. The courts provide a more neutral and detached forum to air the claims of employees. The Court decided that civil actions did not include appeals to the MSPB from agency decisions. Gavette, 808 F.2d at 1461.

The Court of Appeals for the Third Circuit decided to award fees under the EAJA for employee proceedings before the MSPB. Miller v. United States, 753 F.2d 270 (3rd Cir. 1985) at p. 275. The Third Circuit Court reasons that

> §2412(d)(3) states that a court reviewing an 'adversary adjudication ... shall include' in its award fees for work done before the agency "to the same extent [the agency is] authorized" to award fees under 5 U.S.C. §504(a)

Miller, 753 F.2d at 275. Thus the court could award fees under the same circumstances as the agency could in its proceedings. The restriction of civil cases is circumvented. While this interpretation greatly advances the Congressional goal of combatting arbitrary agency action, it also serves to nullify the restrictions on "adverse adjudications" (which define tenure adjudications

as not adverse adjudications once the appeal reaches the court level).[4]

It is vital to determine which level of appeals procedure the EAJA reaches. The Back Pay Act covers only attorney fees, not expenses, whereas the EAJA covers both. More importantly, the burdens are placed differently by the EAJA and BPA. Under the EAJA, the government must pay fees and expenses unless the court finds the position of the government agency substantially justified.[5] The agency must actively show that its actions were justified. Under the BPA, the employee must show that he was the prevailing party and that attorney fees are warranted in the interest of justice.[6] Thus the employee must not only prevail,

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4 5 U.S.C. §554.

5 28 U.S.C. §2412(d)(1)(A).

6 5 U.S.C. §7701(g)(1).

but must also prove that his cause is just under the BPA, whereas this is essentially assumed under the EAJA. The higher burden under the BPA will result in fewer meritorious claims being awarded fees and expenses.

The present case is an excellent example. Certain cases ruling on the availability of attorney fees require that the petitioner be substantially innocent to recover fees. Wise v. Merit Systems Protection Board, 780 F.2d 997 (Fed. Cir. 1985), Ferry v. Department of the Navy, (A. 1-4); Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983). Other cases reason that substantial innocence is only one standard for awarding attorney fees. Yorkshire v. Merit Systems Protection Board, 746 F.2d 1454 (Fed. Cir. 1984), Hoska v. Department of the Army, 694 F.2d 270 (D.C. Cir.

1982), Keely v. Merit Systems Protection Board, 760 F.2d 246 (Fed. Cir. 1985). 5 U.S.C. §7701 allows recovery under several different justifications. If seeking to recover under substantial innocence though, the burden rests on petitioner to prove his substantial innocence of the charges brought against him (and thus the justness of his claim), and the court can apply narrow standards and find that because the petitioner has not been totally cleared of all of the charges, he is not substantially innocent. If the agency had to prove substantial justification, it could not do so. Its reliance on regulations which it could not produce and its pursuit of AWOL charges even after the decision of the Department of Labor that petitioner was validly injured and disabled show the unreasonableness of the agency's position. This follows from the decision in Olsen v.

Department of Commerce, Census Bureau, 735 F.2d 558(Fed. Cir. 1984) where an agency that did not follow its own guidelines was not substantially justified. In Brewer v. American Battle Monuments Commission, 814 F.2d 1564 (Fed. Cir. 1987), an agency which continued to press charges after they were disproved was not substantially justified. Thus, because petitioner was judged under the BPA standard rather than the EAJA standard, fees and expenses were not recovered in a situation where the agency persisted in pressing unwarranted charges.

Not only do different circuits apply the EAJA to different levels of the appeals proceedings, but the substantial justification requirement is interpreted differently. The Third Circuit Court states in Natural Resources Defense Council v. U.S.E.P.A., 703 F.2d 700 (3d

Cir. 1983), at p. 707 that the test for government actions is one of reasonableness. The reasonableness test is further elaborated in Miller v. United States, 753 F.2d 270. The government must show that it has a reasonable basis for the facts it alleges, a reasonable basis in law for the theory it propounds, and there must be a reasonable connection between the facts alleged and the legal theory advanced. Miller, 753 F.2d at 274. If the government agency's actions pass this three part test, it is substantially justified. See also, United States v. Yoffe, 775 F.2d at 450(1st Cir. 1985) (First Circuit applies reasonableness test).

A higher standard has been required by the Federal Circuit. The Court stated that substantial justification was "not simply equivalent to reasonableness."

Gavette, 808 F.2d at 1467. The Federal Circuit Court held that substantial justification required the government to show that it was clearly reasonable. Gavette, 808 F.2d at 1467. This would deter the government agency from making a claim on a weak factual and/or legal basis.

Certainly the clearly reasonable requirement more closely hews to the purpose of Congress in passing the EAJA. During floor discussions, Senator DeConcini was concerned that, "There are vast resources that enforce the arbitrary decisions of autocratic bureaucrats, but there are very few individuals or small businesses that can afford to fight back." 125 Cong. Rec. S. 10915. Because the agency has such resources at its disposal, it should be required to show more than mere reasonableness. Many arbitrary ac-

tions can be justified under a reasonableness standard. Senator DeConcini goes on to state that "If bureaucrats knew that more of their actions would be subjected to questions in court, I believe that the tendency of many bureaucrats to be careless, arbitrary, and irresponsible would cease." 125 Cong. Rec. S. 10915. This in turn depends on the fee awards. "The pervasive theme of the debate was the goal of encouraging 'little people' to challenge unreasonable actions by government bureaucrats instead of acquiescing because of the expense of legal challenge." 125 Cong. Rec. S. 10915. If the employee knew that all the agency must show is reasonableness, he will be reluctant to press his grievance. It is usually not difficult for an attorney to show that a legal theory could be accepted, or that a legal theory could possibly be applied to the facts. The

Federal Circuit Court demanded that the government show more than the "existence of a colorable legal basis for the government's case." Gavette, 808 F.2d at 1467. The existence of such a basis can be merely a pretext for harassing employees or the agency can thoughtlessly press charges on every technical violation without examining the merits of its case. The standard must be high enough to ensure that government agencies will examine the validity of their actions and only take proceedings against those employees who have actually violated the regulations.

2. Under the Back Pay Act[7], the award of attorney's fees has been inconsistent. The "interest of justice" standard has been applied unevenly and some meritorious claims of arbitrary agency action have been denied an award of fees. To further

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[7] 5 U.S.C. § 7701(g)(1).

the public policy of encouraging employees to challenge arbitrary and capricious actions, the law must be settled as to when prevailing employees can expect to receive attorney fees and costs.

The seminal case in this area is Allen v. United States Postal Service, 2 MSPB 582. After examining the hearings and debate of Congress in passing the Back Pay Act, the MSPB attempted to quantify the vague interest of justice standard by setting forth examples of when it would be violated.[8] These examples are less vague

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[8] The standard is violated: 1. Where the agency engaged in a "prohibited personnel practice." (§7701(g)(7); 2. Where the agency's action was "clearly without merit" (§7701(g)(1), or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency; 3. Where the agency initiated the action against the employee in "bad faith," including: a. Where the agency's action was brought to "harass" the employee; b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways"; 4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee; 5. Where the agency "knew or should have known that it would

than "interest of justice" but can still allow unduly prosecuted employees to slip through the requirements, especially when a court mechanistically applies the examples without taking into account the merit of the employee's claim. The standard needs to be further clarified so that those employees with just claims can be certain of recovering attorney fees for their efforts.

Although the MSPB has listed a number of justifications for recovery of attorney fees, the courts have declined to award fees in some cases if the petitioner was not substantially innocent. However, this has not been consistently followed, not even in the Federal Circuit Court itself. In Yorkshire, 746 F.2d 1454, the court examined the substantial innocence

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not prevail on the merits" when it brought the proceeding. Wise v. Merit Systems Protection Bd., 780 F.2d 997 (Fed. Cir. 1985) at 999.

requirement and the standard of whether the agency should have known it would not prevail on the merits. The court states that attorney fees are warranted if either of these conditions are applicable. Similarly, in Hoska, 694 F.2d 270, the D.C. Circuit Court awarded fees on the grounds that the agency's actions were wholly unfounded as well as the substantial innocence of the petitioner.

Conversely, the Federal Circuit Court in Wise, 780 F.2d 997, decided that the petitioner was not substantially innocent, and that any duty of the agency to investigate was mitigated by the finding that petitioner was not substantially innocent. In Sterner, 711 F.2d 1563, the court states that, ". . . petitioner's lack of substantial innocence is not controlling at the first, eligibility, stage." "However, the extent of a party's

victory is clearly relevant generally to the justice of his cause. Therefore, . . . we also hold that the de minimis nature of the victory obtained by a prevailing employee may be considered by the board under the aegis of the second, 'interest of justice', prerequisite." Sterner, 711 F.2d at 1567-1568. Here the finding of substantial innocence is made a prerequisite of recovery of attorney fees under any of the other standards. In Ferry, (A.1-4), the Federal Circuit Court first decided that petitioner was not subtantially innocent. The Court then goes on to say that, "Petitioner's various other grounds for relief sought here have been examined. In view of the foregoing, these contentions do not require discussion." Following this line of reasoning would lead to the conclusion that a petitioner would have to prove his substantial innocence to gain a fee award.

This is clearly not intended by the Congress or the MSPB's interpretation as set forth in footnote eight. The different standards for recovery of attorney fees are set out in the alternative, and are not contingent on a finding of substantial innocence. This needs to be clarified and followed to ensure that arbitrary agency actions are still deterred. In the current case, even if the petitioner is not found to be substantially innocent, agency actions which were clearly without merit, gross procedural error, or in some other way violated the interest of justice standard are still undesirable and contrary to Congress' policy and attorney fees should be granted.

The most problematic part of the MSPB guidelines is determining when a person is "substantially innocent" of the charges

brought against him. The cases dealing with "substantial innocence" reach contradictory conclusions. In Boese v. Department of the Air Force, 784 F.2d 388, (Fed. Cir., 1985) substantial innocence was found where the major defalcation charge was dismissed and the minor assault charge penalty was mitigated from removal to a 90 day suspension. Even though the charges were not wholly unfounded, Boese was cleared on testimony given. The agency had not proven its charges. Boese was substantially innocent because the agency brought charges which were not applicable to his behavior. Similarly, in the present case, the agency did not prove the charges, but an agreement was reached where the removal penalty was mitigated to an eight day suspension. The AWOL charges were dropped for the majority of the time for which they were charged and due to the fact that the agency could not produce the

regulation petitioner allegedly violated, those charges were also dropped - after almost two years (and well over 100 hours spent by counsel). Yet on the issue of attorney fees, petitioner was found to be not substantially innocent. This finding by the presiding official directly contrasts with his earlier decision reversing the removal penalty and substituting an eight day suspension. This earlier decision relies heavily on the stipulated testimony of both witnesses from the Department of the Navy and indicates that, "a substantial portion of the sustained charges has been reversed" (emphasis added). (A. 34)

Often a court will base its determination of substantial innocence on the extent of an employee's victory or the magnitude of the injustice committed by

the agency.[9] However, application of this interpretation has lead to different results. In Van Fossen v. Merit Systems Protection Bd., 788 F.2d 748 (Fed. Cir. 1986), all of the charges were upheld against the employee. However, the employee had attempted to comply with regulations as described to him. Unfortunately, the interpretation relied on was incorrect, so the regulations were violated. The Court decided to find the employee innocent. On the other hand, the petitioner in Sterner v. Department of the Army, 711 F.2d 1653, was found to be not substantially innocent of the charges brought against him. The petitioner had the penalty of removal mitigated to suspension after a number of the charges were dismissed. The Court decided that the charges dismissed were only technical

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[9] Van Fossen v. Merit Systems Protection Bd., 788 F.2d 748 (Fed. Cir. 1986) at 749.

and that the extent of the employee's success did not merit attorney fees.

In the current case, petitioner attempted to comply with the regulations as they were described to him. However, petitioner was found to have failed to comply with the regulations even though the actual regulation which he was charged with violating has never, to this day, been produced by the agency. The information he relied on from the agency was incorrect. The penalty was mitigated from removal to a stipulated eight day suspension. The extent of victory and magnitude of the injustice measures have been applied unequally and inconsistently. Guidelines to determine how these standards should be applied are needed.

The question of when an employee has made a good faith effort to comply with

the regulations is an unsettled area which needs to be delimited. Those employees who withhold information from the agency are not substantially innocent. Wise v. Merit Systems Protection Board, 780 F.2d 997 (Fed. Cir. 1985). The court states, "Such an individual brings the consequences of the agency's legal proceedings upon himself and is in no way an innocent victim who is entitled to the award of attorney fees in the interest of justice." Wise, 780 F.2d at 1000. The petitioner in Wise, 780 F.2d 997, had participated in an illegal strike and failed to return to work before the amnesty deadline. The petitioner had attempted to return to work by presenting the appropriate information to a congressman and the Department of Transportation. Although the presiding official was aware that petitioner had given information to others, the court

decided that petitioner had to present the information to the agency and the presiding official. Conversely, in Van Fossen, 788 F.2d 748, the petitioner relied on an incorrect interpretation of the regulations which was followed by agency personnel. The petitioner gave the information to the wrong person and received the authorization he needed from the wrong person. Nevertheless, it was decided that a good faith effort had been made to follow the regulations, and the petitioner was substantially innocent. In the current case, petitioner attempted to follow the regulations as described to him, but was held to be not substantially innocent because the presiding official found that he withheld evidence from the agency. The petitioner relied on the directions of different persons in the agency and those persons apparently misinterpreted the regulations. The re-

sult was that petitioner sent forms and information to the Navy and the Office of Worker's Compensation, which freely communicated with each other.

Clearly, some efforts should meet the burden of bringing vindicating evidence to the agency. When an employee follows the directions of the agency, he should not be penalized for failing to follow regulations of which the agency is knowledgable. The intent of Congress to make agencies less arbitrary is certainly not served by allowing an agency to incorrectly explain a regulation to an employee, have the employee follow the explanation, and then penalize the employee for not providing vindicating information according to the regulations. Where an employee follows the directions of the agency, the Van Fossen rule should apply, i.e., employees who make a good faith effort to comply

with the regulations should be found substantially innocent, and not be found to have intentionally refused to provide the proper forms and evidence.

Substantial innocence should be tailored to avoid the problem of an individual who violates one regulation but is innocent of the other charges. Even if the violation is major, one transgression of the regulation should not stop the recovery of attorney fees for the defense of other groundless charges blindly pursued by the agency. Under the current interpretation, if the employee is found to have violated one regulation, it is very difficult to be found substantially innocent of the charges and recover any fees. Sterner, 711 F.2d 1563, Sims v. Department of the Navy, 711 F.2d 1578. By according some weight to the actions of the employee, the court can award attorney

fees for those charges which are groundless. The public policy Congress intended to promote is served by forcing agencies to be certain all of its charges are valid. The employee who is overcharged should not have to undergo this added burden any more than the employee who is totally innocent of any charges. Sloppy agency charging procedures are as great an evil as the prosecution of innocent employees. The courts should concentrate on whether the employee's conduct was improper in all the aspects that the agency alleges.

There is disagreement among the cases as to what constitutes a groundless or meritless charge on the part of the agency. In Yorkshire v. Merit Systems Protection Bd., 746 F.2d 1454, the charges were found to be groundless because the agency proceeded with unspecific evidence

which the plaintiff countered. In Keely v. Merit Systems Protection Bd., 760 F.2d 246, the agency brought an appeal on contentions which lacked merit, according to the MSPB, because they were based on requirements not shown to be approved for use. In the current case, the agency's actions were not determined to be groundless, although the Department of Labor found that the petitioner was disabled and eligible for compensation and the agency continued to press both AWOL charges for the period of work-related disability and charges on a regulation which was never specified or produced. This tension among the cases clouds the determination of what constitutes a groundless charge. If the unspecified evidence in Yorkshire, 746 F.2d 1454 will not support a charge, the unspecified regulation in the current case should not support a charge either. Certainly an agency should have a clear

and specific basis, in the regulations and on the evidence, before it presses charges. When a regulation is so insubstantial that it cannot be produced or when evidence is so insubstantial that it will dissipate in the face of the facts, an agency which proceeds on that basis displays the arbitrariness and capriciousness which Congress has condemned. The agency should be forced to produce evidence of a substantive nature and produce the regulation alleged to be violated to avoid the groundless/meritless action restriction.

Attorney fees should be awarded when the agency knew or should have known it would not prevail on the merits. This standard has been interpreted in various ways. An initial question is how far the agency must check to determine whether it would win. In Wise, 780 F.2d 997, there

was evidence available which would have cleared the employee but which the agency did not find. The court decided that the agency had not violated a duty to investigate the evidence because the petitioner had deliberately withheld the evidence from the deciding official. This was true because the employee had attempted to go through Congressional channels rather than administrative channels. However, if exonerating evidence is presented to the agency by the employee in some fashion, the agency has a duty to investigate the evidence.[10] The area of conflict is when an agency's duty to investigate is triggered. Also, the extent of an agency's investigations which it must carry out under its own initiative needs to be determined. In the current case, the administrative judge decided that petitioner had intentionally withheld

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10 Steger v. Defense Investigative Service, Department of Defense, 717 F.2d 1402

information from the agency because he communicated with the Office of Worker's Compensation rather than with his shop. The Office of Worker's Compensation regularly disclosed information it had to the agency, however. So the agency was aware of petitioner's reasons for his absense, but through alternative channels. Under Steger v. Defense Investigative Service, Dep't of Defense, 717 F.2d 1402, the agency should have inquired further into the reasons for petitioner's absence, especially when the agency had access to the documents and conversations which explained petitioner's status. When an agency presses on with charges when it has evidence that the charges may not be valid, it is unreasonable not to investigate the evidence.

There was some dispute and confusion among agency officials over where the forms were to be filed and to whom the

petitioner was to report which was not resolved due to the failure of the agency to produce the applicable regulation. At a hearing before the Administrative Judge, John Kutschera, production superintendent of the machine shop where petitioner worked, testified that petitioner should report to him to be reassigned to light duty work while petitioner was still recovering. (A.76-78). Mr. Kutschera testified that petitioner did not have to go to the personnel office. (A. 76-77). Linda Shay, the supervisory personnel assistant in the personnel office, directly contradicted Mr. Kutschera and testified that the correct procedure was for petitioner to report to the personnel office to be assigned light duty work and thus not to the shop. (A. 74-75). Because no one could refer to a written copy of the regulation, no one could be

sure of the proper procedure.[11] This uncertainty should not negate the agency's duty to investigate whether it would win on the merits but should require an even greater agency investigation. In a similar situation in Van Fossen, 788 F.2d 748, where the employee received an authorizing memo from the wrong person because of a misinterpretation of the regulations, the employee was still vindicated by the evidence presented. In the current case, the petitioner sent requested forms to the agency and to the Office of Worker's Compensation, which regularly communicated with the agency.

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[11] Although this irreconcilible conflict existed between the versions of the only two agency witnesses, the Administrative Judge surprisingly made a finding that nevertheless, the petitioner was in violation of this "regulation", but made no finding as to which version represented the actual regulation. To this day, no evidence has been produced by the agency to resolve this glaring inconsistency.

Of these two interpretations, the Steger, 717 F.2d 1402, rationale achieves the purposes of the BPA. Congress was concerned that, "Employees whose agencies have taken unfounded actions against them may spend a considerable amount of money defending themselves against these actions, ..." Allen, 2 M.S.P.B. at p. 588. The burden should rest on the agency to investigate and ensure its actions are not groundless. If the employee must affirmatively provide evidence to the agency beyond what is required under the regulations, then the employee is expending time and money to counter the agency's accusations. Clearly, the agency has more resources at its disposal to find out facts and evidence, so it should have the burden. The bureaucracy will not be deterred from pressing meritless charges if the employee must show they are meritless. Barring active measures by an

employee to conceal information, the agency should have to investigate all its charges and insure their validity. The agency should have to examine records and evidence it knows of or has reason to suspect exists. If the agency presses ahead with charges it has not fully checked for validity, attorney fees should be granted if the charges are groundless. This effort on behalf of the agency is a small burden when compared with the needless prosecution of employees.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

BY: George J. Badey III

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Date: JUNE 20, 1988

CERTIFICATE OF SERVICE

I, George J. Badey III, hereby certify that 40 copies of the within Petition for Certiorari and Appendix were sent by First Class U.S. Mail to the Supreme Court of the United States on June 20, 1988.

I further certify that 3 copies of the aforesaid documents were served by First Class Mail, postage prepaid on June 20, 1988 upon counsel for respondent at the address listed below.

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88-8

NO.:

Supreme Court, U.S.
FILED
JUN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOSEPH P. FERRY, PETITIONER

v.

DEPARTMENT OF THE NAVY

APPENDIX OF PETITIONER

GEORGE J. BADEY III, ESQUIRE
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Attorney for Petitioner

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-3507

JOSEPH P. FERRY,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent,

DECIDED: March 21, 1988

Before FRIEDMAN and RICH, Circuit Judges, and BENNETT, Senior Circuit Judge.

PER CURIAM:

DECISION

Petitioner Jospeh P. Ferry has appealed the disallowance of attorney fees by the Merit Systems Protection Board, MSPB Docket No. PH075284A0405. We affirm.

OPINION

Petitioner was removed from civilian employment with the Department of the Navy in 1984. This action was affirmed by the

MSPB and then appealed to this court. In an unpublished decision, Ferry v. Department of the Navy, No. 85-2063 (Fed. Cir. Oct. 29, 1985), the court instructed the MSPB to reopen the case for consideration of certain additional matters. This resulted in a reversal of the removal action and mitigation of the penalty to an 8-day suspension. That MSPB decision became final on April 21, 1986. Petitioner then filed for an award of attorney fees which the MSPB denied on August 13, 1986. Fees were denied on the basis that petitioner was not "substantially innocent" of the charges and should not be awarded fees "in the interest of justice." 5 U.S.C. §7701(g)(1) (1982). That denial was unquestionably correct.

Petitioner satisfies the statute's requirement that he must establish that he was the "prevailing party." But, he does not meet the requirement that the payment

be "in the interest of justice." The MSPB found that petitioner was AWOL from January 24, 1984 through March 6, 1984. Petitioner failed to give his shop written justification and medical certification for his 6-week absence, in violation of direct instructions of his shop superintendent. On our remand, the board excused his absence from June 9, 1983 through January 23, 1984, based on a Department of Labor decision which found him to be disabled during that period. However, for the unexcused period which was the basis for his suspension, petitioner intentionally refused to provide his agency with the required documentation to justify his absence. This is fatal to his claim of substantial innocence. Wise v. MSPB, 780 F.2d 997 (Fed. Cir. 1985).

Petitioner's various other grounds for relief sought here have been examined. In view of the foregoing, these contentions

do not require discussion. A mitigated penalty does not necessarily require the award of attorney fees. It depends on the facts. Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983); Sims v. Department of the Navy, 711 F.2d 1578 (Fed. Cir. 1983). Here, petitioner was not vindicated of the charge of AWOL. His suspension was for the efficiency of the service. Petitioner has so stipulated. This is too weak a reed on which to hang a claim for attorney fes in the interest of justice, expecially absent any finding by the MSPB of bad faith or harmful procedural error in the suspension penalty on the part of the United States. Petitioner has been well represented by counsel but under the circumstances of this appeal he, and not respondent, is responsible for his attorney fees. The record on appeal gives us no basis for reversal. See 5 U.S.C. §7703(c) (1982).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. FERRY, Appellant,	)	Docket Number PH075284A0405
v.	)	
DEPARTMENT OF THE NAVY Agency.	)	DATE: Jul 8 1987

George J. Badey, III, Esquire, Philadelphia, Pennsylvania for the appellant,

Jerome A. Snyder, Philadelphia, Pennsylvania, for the agency

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

Member Devaney dissents without opinion.

ORDER

After full consideration, the Board DENIES appellant's petition for review of the addendum decision issued on August 13, 1986, because it does not meet the criteria for review set forth at 51 Fed. Reg. 25,158 (1986) (to be codified at 5

C.F.R. §1201.115).* This is the Board's final order in this appeal. The addendum decision is now final. 5 C.F.R. §1201.113(b).

NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your appeal, if the court has jurisdiction. 5 U.S.C. §7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

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* On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

JOSEPH P. FERRY, Appellant, v. DEPARTMENT OF THE NAVY Agency.	)))))))	Docket Number PH075284A0405 DATE:Aug 13 1986

BEFORE

Frederick L. Fishman, Administrative Judge

INITIAL DECISION

INTRODUCTION

By motion of May 15, 1986, counsel for the appellant filed for an award of attorney fees in this appeal. By initial decision dated September 20, 1984, I affirmed the appellant's removal from his position with the agency. The appellant appealed my decision to the Board. On January 15, 1985, the Board issued an order denying the appellant's petition for review. The appellant appealed the final

Board decision to the United States Court of Appeals for the Federal Circuit, Washington, D.C. On October 29, 1985, the court issued a decision vacating and remanding the appellant's case to the Board. The court instructed the Board to reopen the record and consider what impact a final decision of the Department of Labor, which granted previously denied workmen's compensation benefits, would have upon the Board's decision. On March 17, 1986, I issued an initial decision in which I reversed the removal action and mitigated the penalty to an eight-day suspension. The decision was not appealed and it became a final decision on April 21, 1986. The Board has jurisdiction over this fee application under 5 U.S.C. §7701(g)(1).

For the reasons set forth below, the motion for attorney fees is DENIED.

ANALYSIS AND FINDINGS

Before an agency can be required to pay the attorney fees of an appellant, such fees must have been incurred by the appellant. Attorney fees are deemed to have been "incurred" within the meaning of 5 U.S.C. §7701(g)(1) if "an attorney-client relationship exists and counsel has rendered legal services on behalf of the appellant and in an appeal before (the) Board," O'Donnell v. Department of the Interior, 2 MSPB 604, 610 (1980). The record indicates that George J. Badey, III is an attorney who is licensed to practice law in Pennsylvania, and has represented the appellant throughout these proceedings. The record clearly demonstrates that there was an attorney-client relationship with the appellant and the attorney fees were incurred within the

meaning of the statute, see Mitchell v. United States Postal Service, 5 MSPB 33 (1981).

Having found that fees were indeed incurred, I must now determine three factors:

(1) Was appellant the prevailing party in this case?

(2) Are attorney fees warranted in the interest of justice?

(3) If warranted, are the requested fees reasonable?

Allen v. United States Postal Service, 2 MSPB 582 (1980) (hereinafter Allen). The Board has determined that an appellant should be considered the prevailing party if he obtains substantially all of the relief he was seeking in his appeal to the Board, see Hodnick v. Federal Mediation and Conciliation Service, 4 MSPB 431, 434 (1980); and Franks v. Department of the Treasury, 12 MSPB 154 (1982). As appel-

lant sought to have the agency's decision to remove him reversed, and it was, he must be deemed to be the prevailing party in this matter, and has thus satisfied the first of the Allen criteria justifying a fee award. See Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983).

To determine if the second Allen criteria, the interest of justice requirement, has been satisfied, an examination of the facts of this case is required. This is because the interest of justice standard is not co-extensive with the prevailing party requirement, and requires additional scrutiny of the particular circumstances of the agency's action. See Allen at 587.

The Board has determined that several distinct types of cases do usually warrant fee awards:

1. Where the agency engaged in a "prohibited personnel practice"; (§ 7701(g)(1));

2. Where the agency's action was "clearly without merit," (§ 7701(g)(1)), or was "wholly unfounded," or the employee was "substantially innocent" of the charges brought by the agency;

3. Where the agency initiated the action against the employee in "bad faith," including:

a. Where the agency's action was brought to "harass" the employee;

b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways."

4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee; and

5. Where the agency "knew or should have know that it would not prevail on the merits" when it brought the proceeding.

Allen at 593.

The list was cited with approval by the court in Lewis v. United States Marine Corps, 674 F.2d 714 (8th Cir. 1982), which

found the Board's Allen criteria to be both reasonable and consistent with the history and language of the Civil Service Reform Act. See also Sims v. Department of the Navy, 711 F.2d 1578 (Fed. Cir. 1983). It is this type of analysis that must be undertaken in this case to determine if a fee award is warranted.

In the instant case, I sustained the appellant's being charged with AWOL from January 24, 1984 through March 6, 1984 and his failure to properly notify his shop of the reasons for his absences. I did not sustain the appellant's being charged with AWOL from June 9, 1983 through January 23, 1984, based on a U.S. Department of Labor decision dated August 7, 1985 which found the appellant disabled from work for the period June 9, 1983 through January 23, 1984. In regard to the issue of whether the appellant violated any official

regulations in effect prior to October 20, 1983, relating to requests for leave and substantiating illnesses, the parties stipulated that this issue should be withdrawn from consideration. Accordingly, I found that it was not necessary or appropriate to have a discussion of this issue. I found that the penalty of removal should be mitigated to an eight-day suspension based on the present sustained charges.

In this case, the appellant asserts that attorney fees are warranted for several reasons. He argues that he did not act in bad faith nor has he committed an infraction of the agency regulations. He contends that the agency committted gross procedural errors. The appellant also contends that the agency prolonged the proceedings by not agreeing to settle the case after a Department of Labor

decision was issued in August of 1985 which found the appellant disabled for work for the period of June 9, 1983 through January 23, 1984.

The agency argues that attorney fees should not be granted. The agency contends that if the appellant had acted in good faith it would not have imposed a penalty of removal upon the appellant. The agency maintains that the appellant was not substantially innocent of the charges. The agency points out that had the appellant supplied the necessary medical documentation in response to management's oral and written orders in January of 1984, the appellant would not have been terminated. In Wise v. MSPB, 780 F.2d 997 (Fed. Cir. 1985), the court held that the "substantially innocent" standard is not satisfied by an individual who (1) knows that he is innocent of the

charges brought against him, (2) can prove his substantial innocence, and (3) deliberately does not communicate all the facts to the deciding official which would lead the deciding official to rule against the removal action. I find that since the appellant intentionally prevented the deciding official from deciding the matter with full knowledge of the relevant facts when he did not supply the requested medical information, he is not substantially innocent of the charges and should not be awarded attorney fees in the interest of justice.*

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* It is noted that the federal circuit in the cases of Van Fossen v. Merit Systems Protection Board, 788 F.2d 748 (Fed. Cir. 1986) and Boese v. Department of the Air Force, 784 F.2d 388 (Fed. Cir. 1986), has held that an employee is substantially innocent of the charges and is entitled to an award of attorney fees when he obtains a very significant part of the relief sought, i.e., a removal penalty reduced to a suspension. I, however, distinguish the findings in those cases with the Wise case in that Wise stands for the proposition that attorney fees are not warranted where the penalty of removal is reversed when an employee was improperly removed because the administrative process was deliberately and improperly drawn out by the

In regard to the appellant's argument that attorney fees should be awarded because the agency prolonged the proceedings and did not settle the matter after the Department of Labor found the appellant disabled from June 9, 1983 through January 23, 1984, I find that there has been no showing that the agency acted in bad faith by not settling the case. Although the Department of Labor's reversal of its previous decision negated much of the appellant's period of unauthorized absence, the remaining charges are serious. As discussed above, I sustained an AWOL charge which pertained to six weeks of unauthorized absence and the appellant's failure to notify the agency of his reasons for absence. I find that the appellant is not entitled to an award of attorney fees in the interest of justice.

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employee's withholding of significant evidence from the deciding official.

The appellant's assertion that he should be awarded attorney fees based on the agency's having committed harmful procedural errors. As pertains to the appellant's argument that he should be awarded attorney fees because there has been no showing that he violated any agency regulation, I find that both sides stipulated at the February 28, 1986 hearing that this issue should be withdrawn from my consideration of the case. Accordingly, I find that this matter does not establish a basis for allowance of attorney fees.

With regard to the question of fees based on a mitigated penalty, the courts have found the Board has not abused its discretion to deny fees in cases where mitigated penalties have been obtained. Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983) (fees properly

denied where removal was reduced to 16-day suspension); Sims v. Department of the Navy, 711 F.2d 1578 (Fed. Cir. 1983) (fees not warranted in interest of justice where removal penalty mitigated to ten-day suspension). The appellant in this appeal committed a substantial offense and received a eight-day penalty. I cannot conclude from this record that the "interest of justice" demands the agency now pay his attorney fees.

DECISION

The motion for attorney fees is DENIED.

REVIEW RIGHTS

Any Party to this appeal may file a petition for review with the Board on the sole issue of attorney fees within 30 days

of the receipt of this determination. Such petition must be filed with the Clerk of the Board, Merit Systems Protection Board, Washington, D.C. 20419.

The parties should note that, pursuant to recent amendments effective August 1, 1985, they are required to serve any petition for review and any subsequent pleadings on all other parties. 5 C.F.R. § 1201.114 as amended, 50 Fed. Reg. 28897-98 (July 17, 1895). It is not necessary to serve this regional office with copies.

FOR THE BOARD:

Frederick L. Fishman
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. FERRY, Appellant,	)	Docket Number PH075284A0405
v.	)	
	)	DATE: Dec 29 1986
DEPARTMENT OF THE NAVY, Agency.	)	

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

This case is before the Board as the result of a petition for enforcement filed in the Board's Philadelphia Regional Office on May 1, 1986. In the petition, appellant alleged that the agency had failed to comply with a March 17, 1986, decision issued by the presiding official, awarding back pay.[1] In an order issued

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[1] This case has a lengthy background. Appellant was removed effective May 5, 1984, for excessive unauthorized absence (AWOL) and failure to properly notify the agency of the reason for the absences. the removal was initially sustained on

May 2, 1986, the Board's Philadelphia Regional Office ordered the agency to submit proof of compliance within ten days. The agency's response indicated that the parties had left the issue of back pay open, to be litigated in a subsequent petition for enforcement. Thereafter, on April 9, 1986, it notified

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appeal to the Board. However, the United States Court of Appeals for the Federal Circuit vacated and remanded the case to the Board to consider the impact on the case of a decision by the Department of Labor (DOL) to grant appellant previously denied workers' compensation benefits. Ferry v. Department of the Navy, Appeal No. 85-2063 (October 29, 1985)(unpublished). At the remand hearing the parties stipulated that in light of the DOL decision, the agency would no longer consider the appellant AWOL through January 23, 1984. The parties also stipulated that the imposition of an eight-day suspension was warranted. In an initial decision dated March 17, 1986, the presiding official sustained only the AWOL from January 24, 1984, through March 6, 1984, and the failure to properly notify the agency of the reasons for the absences. He reversed the agency's removal action and imposed the stipulated eight-day suspension with retroactive restoration effective from the date of suspension. The agency was also ordered to award back pay and benefits in accordance with 5 C.F.R. § 550.805. If there was a dispute as to the amount of back pay, the agency was to issue a check for the amount not in dispute. This initial decision became a final Board decision on April 21, 1986, since no petition for review was filed.

appellant that it would not award back pay because it had no liability under the Back Pay Act, 5 U.S.C. § 5596(b). Appellant responded that the agency is estopped from raising the issue of appropriateness of back pay at this procedural stage of the case, since the appeal period had expired without action from the agency, and the agency had thus waived its right to contest the appellant's right to back pay and benefits.

The Chief Administrative Judge issued an Enforcement Recommendation on June 24, 1986, and referred the case to the full Board for enforcement. The Recommendation fully addressed the back pay issue and ordered the agency to submit proof of compliance or to file a response explaining why it disagreed with the recommendation. The agency was also told to provide the name, title, and grade of the agency official responsible for the failure to

comply if it was to file a response. The agency subsequently submitted a response to the Enforcement Recommendation, but did not provide the information on the responsible official.

The agency argues that no back pay is owed because (1) the personnel action was neither "unwarranted or unjustified" because it was proper at the time taken; (2) notwithstanding the DOL decision, appellant essentially abandoned his employment and therefore, must be held responsible for his removal; and (3) no "appropriate authority" found the original personnel action "unwarranted or unjustified" as required by the Back Pay Act. These are the same arguments that were made before the Chief Adminstrative Judge. The Chief Administrative Judge first found that the decision in this case did adjudicate the back pay issue and found that decision to be a legally enforceable

Board decision. He then found that the cases cited by the agency posed no legal bar to an award of back pay in this case. He concluded that where the action of a reviewing authority reverses the earlier basis for a removal, back pay is not prohibited by the Back Pay Act. Robinson v. Department of the Army, 21 M.S.P.R. 270 (1984). We concur.

The agency insists that the "posture of the case" is that the back pay issue can be litigated as part of the petition for enforcement, a position which it claims was agreed to by the parties and the presiding official. It claims that a representation to this effect was made by the presiding official. However, a reading of the presiding official's initial decision does not support what the agency is now expounding. The Board will not now rectify this mistaken belief held by the agency. The Board agrees with

appellant that at this procedural stage of the case, the agency is now estopped from raising the issue of the appropriateness of back pay.[2]

The Board accepts the Enforcement Recommendation's analysis and findings and holds that the agency has not complied with the Board's decision reversing appellant's removal.

Accordingly, the agency is ORDERED to provide appellant with back pay and benefits from the date of his removal to the date of his reinstatement, excluding only the period of suspension. The agency is further ORDERED to provide to the Clerk of the Board within 5 days of the date of this order the name, title, and grade of the agency official responsible for the failure to comply, as previously asked for

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[2] If the agency disagreed with the initial decision of March 17, 1986, or any parts of it, it was incumbent upon it to file a petition for review within 35 days of the issuance of the initial decision. 5 C.f.R. § 1201.114.

in the Chief Administrative Judge's Enforcement Recommendation of June 24, 1986. Also the agency is ORDERED to submit to the Clerk of the Board within 10 days of the date of this order, satisfactory evidence of compliance with the Board's decision. Failure to comply may result in the imposition of sanctions pursuant to 5 U.S.C. § 1205(a)(2) and (d)(2).[3]

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

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[3] Section 1205(a)(2) provides that the Board may order a federal employee to comply with its orders and enforce compliance. Section 1205(d)(2) provides that the Board may order that an employee "shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with." The procedure for implementing these provisions is set out at 51 Fed. Reg. 25164-65 (1986) (to be codified at 5 C.F.R. § 1201.183).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opinion and Order was sent by regular mail this date to:

Joseph P. Ferry
c/o George J. Badey, III, Esquire

George J. Badey, III, Esquire
Law Offices
Stephen A. Sheller & Associates
1515 Locust Street, 6th Floor
Philadelphia, PA 19102-3792

Stephanie Klein, Esquire
Office of Counsel, Code 107
Room 211, Building 11
Philadelphia Naval Shipyard
Philadelphia, PA 19112

Office of Personnel Management
Attn: Appellate Policies Branch
Room 7635
1900 E Street N.W.
Washington, DC 20415

By hand to:

Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, DC 20419

12/29/86
(Date)

Robert E. Taylor
Clerk of the Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

JOSEPH P. FERRY,	)	INITIAL DECISION
	)	NUMBER
Appellant,	)	PH0752810405-1
	)	
v.	)	
	)	Date: Mar 17, 1986
DEPARTMENT OF	)	
THE NAVY,	)	Frederick L. Fishman
Agency.	)	Presiding Official

INTRODUCTION

The appellant was removed from the position of Machine Tool Operator by the Department of the Navy on May 5, 1984, for excessive unauthorized absence and failure to properly notify his shop of reasons for his absence. On May 23, 1984, the appellant appealed the agency action to this office. In an initial decision issued on September 20, 1984, I affirmed the removal action. The appellant appealed my decision to the Board. On January 15, 1985, the Board issued an order denying the appellant's petition for review. The appellant appealed the final

Board decision to the United States Court of Appeals for the Federal Circuit, Washington, D.C. On October 29, 1985, the court issued a decision vacating and remanding the appellant's case to the Board. The court instructed the Board to reopen the record and consider what impact a final decision of the Department of Labor, which granted previously denied workmen's compensation benefits, would have upon the Board's decision and whether the appellant violated any official regulation in effect prior to October 20, 1983, relating to requests for leave and substantiating illnesses. A hearing was held on February 28, 1986, confined solely to the above issues. In lieu of calling witnesses at the hearing the parties decided to enter into various stipulations which will be discussed below.

For the reasons set forth below, the agency action is reversed.

ANALYSIS AND FINDINGS

The appellant was removed from his position of Machine Tool Operator effective May 5, 1984. The agency removed the appellant from his position based on charges of excessive unauthorized absence and failure to properly notify his shop of reasons for his absence. In my initial decision, I sustained the excessive unauthorized absence charge and failure to provide proper notification of absences covering the dates from June 10, 1983 through July 15, 1983, and from September 20, 1983 through March 6, 1984.

At the February 28, 1986, hearing the parties placed into the record a U.S. Department of Labor decision dated August

7, 1985, which found that the appellant was disabled for work for the period June 9, 1983, through January 23, 1984 (Joint Hearing Exhibit 4). The parties stipulated that in light of this decision the agency can no longer consider the appellant AWOL during any of the said period and the appellant cannot be charged with improper notification of his absences. In view of the evidence showing that the appellant was disabled during the time period in question and the stipulation by the parties that there is no longer a basis for bringing this part of the charges, I find these charges not sustained.

As pertains to the appellant's being charged with AWOL from January 24, 1984, through March 6, 1984, and his failure to properly notify his shop of the reasons for his absences, the appellant has not

furnished any additional evidence to justify or excuse these absences and has not shown that he properly notified his shop for these absences. Accordingly, I shall incorporate by reference my findings in my September 20, 1984, initial decision which sustained these charges. Thus, I find the charges sustained by a preponderance of the evidence.

In regard to the issue of whether the appellant violated any official regulations in effect prior to October 20, 1983, relating to requests for leave and substantiating illnesses, the parties stipulated that this issue should be withdrawn from consideration. Accordingly, I find that it is not necesary or appropriate to have a discussion of this issue.

The parties stipulated that the imposition of an eight-day suspension based upon the now sustained charges is warranted and promotes the efficiency of the service. The parties stipulated that if called to testify both John Kutchera and Linda Shay would testify that in this particular case, an eight-day suspension rather than removal, is an appropriate penalty for a number of reasons. Some of the most pertinent stipulated reasons are as follows: a substantial portion of the sustained charges has been reversed; the appellant has no prior disciplinary record; the appellant has not received any performance evaluations below satisfactory; that there are other cases at the agency where employees were given similar penalties for similar offenses committed; that the offense does not appear to the agency to have been committed maliciously or for gain; that the suspension will

deter the appellant from committing future offenses; and that an eight-day suspension for the offense committed is consistent with the agency table of penalties.

Based upon the stipulation of the parties above in regard to the type of penalty that should be imposed for the offenses committed and my independent review of the reasons the parties took into consideration in determining that an eight-day suspension was a reasonable penalty, I find that the penalty of an eight-day suspension can be considered appropriate under the circumstances of the case. Douglas v. Veterans Administration, 5 MSPB 313 (1981). Of particular importance here in determining that the penalty of removal should be reduced to an eight-day suspension is the fact that I did not sustain a

good portion of the charges and that other employees have received a similar penalty for like offenses committed.

The agency may take a suspension action only for such cause as to promote the efficiency of the service. 5 U.S.C. § 7513. The parties have stipulated in the instant case that the imposition of an eight-day suspension promotes the efficiency of the service. Further, it is well-settled law that unauthorized absence from duty is proper grounds for suspension or removal since by its very nature it disrupts the efficiency of the service. See Chiaverini v. United States, 157 Ct. Cl. 371 (1962); Ruben v. United States, 150 Ct. Cl. 28 (1960); Chiriaca v. United States, 235 F. Supp. 850 (N.D. Ala. 1963) aff'd, 339 F.2d 588 (5th Cir. 1964). The Board has also held that suspension or removal for AWOL promotes the efficiency

of the service. See Williamson v. Department of Health and Human Services, 3 MSPB 142 (1980) and Desiderio v. United States Department of the Navy, 4 MSPB 171 (1980).

DECISION

The agency's removal action is reversed.

NOTICE

The agency is ordered to cancel the removal action and to substitute an eight-day suspension and retroactively restore appellant effective from the date of his suspension. Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within twenty days of the date this decision becomes final.

The agency is also ordered to award back pay and beneifts in accordance with 5 C.F.R. § 550.805, Spezzaferro, et. al. v.

Federal Aviation Administration, 24 M.S.P.R. 25 (1984); Robinson v. Department of the Army, 21 M.S.P.R. 270 (1984).

The agency is ordered to complete all computations and issue a check to the appellant for the appropriate amount of back pay within sixty days of the date this decision becomes final. The appellant is ordered to fully cooperate in good faith with the agency's efforts to compute the amount of back pay due.

If there is a dispute as to the amount of back pay, the agency shall issue a check to appellant for the amount not in dispute within the above time frame. Appellant may then file a petition for enforcement concerning the disputed amount.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on 21 Apr 1986, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113-117 (1985). Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a peition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Ave., N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. The parties should note that, effective August 1, 1985, they are now required to serve any petition for review and any subsequent pleading on all other parties. The petition for review must be filed on or

before 21 Apr 1986 and must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

Any appellant adversely affected or aggrieved by a final decision of the Board may file a petition with the United States Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. § 7703. A petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days after the Board's decision becomes final. Petitions must be sent to:

U.S. Court of Appeals for the Federal Circuit,
717 Madison Place, N.W.
Washington, D.C. 20439

For the Board:

Frederick L. Fishman
Presiding Official

UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

No. 85-2063
PH07528410405

JOSEPH P. FERRY,
Petitioner,

vs.

DEPARTMENT OF THE NAVY,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: VACATED AND REMANDED TO BOARD FOR FURTHER CONSIDERATION.

DATED October 29, 1985 ENTERED BY ORDER OF THE COURT

Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: Jan 13, 1986

UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

JOSEPH F. FERRY, Petitioner	)	
V.	)	Appeal No. 85-2063
DEPARTMENT OF THE NAVY, Respondent	)	

DECIDED: October 29, 1985

Before FRIEDMAN, RICH, and BENNETT, Circuit Judges

PER CURIAM.

DECISION

Petitioner appeals the decision of the Merit Systems Protection Board (board), 26 M.S.P.R. 422 (1985), which denied review of and made final the September 20, 1984 decision of the presiding official, affirming the action of the Department of the Navy (agency) which removed petitioner from his position at the Philadelphia

Naval Shipyard, effective May 5, 1984. We vacate the decision and remand the case to the board for further consideration.

OPINION

Petitioner was dismissed upon charges of "excessive unauthorized absence and failure to properly notify the shop of [his] reasons for absence." The board found that petitioner was absent from work without permission from June 10 through July 15, 1983, and from September 20, 1983 through March 6, 1984.

Petitioner suffered a job-related injury on June 1, 1983, and advanced this as his reason for not reporting for work, but he failed to comply with oral and written instructions to support the given reason with medical certification. In a decision on January 11, 1984, the Office of Workers' Compensation Programs, United States Department of Labor, granted

benefits to petitioner for 7 days immediatly following the accident but denied them for any period after June 9, 1983. However, in a subsequent opinion, the Department of Labor reversed its prior decision and granted benefits for the full period prior to January 23, 1984, when he was stated to have been medically qualified to resume full employment. The second compensation decision became final on August 9, 1985.

The latter compensation decision, of course, was not available to the board which had made its final decision on January 15, 1985. Whether the board was influenced in any way by the first compensation decision, it does not say. The new matter was not brought to the court's attention until petitioner's reply brief was filed on September 30, 1985. Petitioner now argues that the board should be reversed because of this newly

discovered evidence, or at least the case should be remanded for a de novo determination, or mitigation of the penalty, if any.

In addition to the foregoing, it was developed at argument on appeal to the court that there was serious question as to whether any procedural regulation for requesting leave and substantiating illness, relied upon by the agency and the board as having been violated by petitioner, was actually in effect prior to October 20, 1983. Respondent was unable to produce for the court a dated regulation which on its face applied to this case. Petitioner claimed that he knew of no required leave procedures but the presiding official found his testimony to be "less than candid" in this regard.

We note that aside from whether there were regulations which petitioner violated, it is clear that petitioner was given

direct instructions from his shop superintentent that he must provide written justification and medical certification for his absences and the degree of his disability for resumption of work, but he did not do so. The presiding official so found and substantial evidence supports his finding.

Upon the briefs, exhibits, and oral argument, the decision of the board is vacated, and the case is remanded to the Merit Systems Protection Board for reconsideration and another opinion, taking into consideration the concerns expressed here about the impact, if any, the final decision of the Department of Labor should have upon the board decision and whether petitioner has violated any regulation or procedure officially in effect prior to October 20, 1983, and, if not, whether it makes a difference. The

board may reopen the record and allow additional evidence, argument, and briefing in its discretion.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. FERRY, Appellant, v. DEPARTMENT OF THE NAVY Agency.	)	INITIAL DECISION NUMBER PH07528410405 DATE: Sep 20 1984

INTRODUCTION

This is an appeal from a removal action. Joseph P. Ferry, the appellant, was removed from the position of Machine Tool Operator, by the Department of the Navy, Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, effective May 5, 1984. By this appeal the appellant seeks to have the agency's decision overturned and to be retroactively restored to his former position. The appellant requested a hearing and it was held on August 3, 1984.

JURISDICTION

An employee may submit an appeal from any action which is appealable to the Board under any law, rule, or regulation. 5 U.S.C. §7701(a). The law provides that an employee in the competitive service who is not serving a probationary period may appeal an action removing him from the Federal service. 5 U.S.C. §§7511(a)(1)(A), 7512(1) and 7513(d). The record shows that the appellant was an employee in the competitive service, that he was not serving in a probationary period, and that he was removed from his position with the agency. Accordingly, I find that this appeal is acceptable for adjudication.

ANALYSIS AND FINDINGS

5 U.S.C. §7701(c)(1)(B) provides that in circumstances such as in the instant case, the agency decision may not be sustained unless that decision is supported by a preponderance of the evidence. In this context, a preponderance of the evidence means "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to suppport a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. §1201.56(c)(2).

The record developed by this office establishes that the appellant was issued an Advance Notice of Proposed Removal dated March 6, 1984, in which the appellant was charged with excessive unauthorized absence and failure to properly

notify his shop of the reasons for his absence. Specifically, the appellant was charged with being continuously absent from duty without approved leave from June 10 through July 15, 1983, and from September 20, 1983 through March 6, 1984.

In order to prove a charge of AWOL the agency must show by the preponderance of the evidence that the appellant's absence was not authorized or that the request for leave had been denied. Chiriaco v. United States, 235 F. Supp. 850 (N.D. Ala. 1963); Greene v. Department of the Navy, 5 MSPB 499 (1981). While the law is clear that an employee cannot demand leave without pay as a matter of right since it is a matter of managerial discretion; Desiderio v. Department of the Navy, 4 MSPB 171 (1980), Holt v. Department of the Navy, 5 MSPB 453 (1981); the agency still has the burden of establishing the propriety of

denying any request for leave. See In Re Van Sciver, 1 MSPB 94 (1979); Bavier v. Department of Transportation, 5 MSPB 73 (1981). This is not to say, however, that the appellant is absolved from any responsibility to show the need for his or her request for leave. See Gullette v. United States Postal Service, 8 MSPB 591 (1981).

In support of the charge of excessive unauthorized absence is a copy of the appellant's time and attendance cards (Tab 7 of Agency File) which shows that the appellant was marked in an unauthorized leave absence status from June 10 through July 15, 1983, and from September 20, 1983 through March 6, 1984, for not reporting to work during these time periods. Mr. John Kutschera, Superintendent 31 Shop, testified that the appellant received an on-the-job injury which occured on June 1,

1983, and that he was placed on a continuation of pay status from June 2, 1983 through July 16, 1983. Mr. Kutschera testified that because the appellant did not submit medical certification to cover his absence from June 10 through July 16, 1983, his claim for compensation benefits was partially denied by the U.s. Department of Labor, and the appellant did not receive benefits for the period from June 10 through July 16, 1983. Mr. Kutschera explained that the appellant did not comply with agency regulations which required bi-weekly medical evaluations of work status reports from a Navy Medical Officer or a private physician while he was on continuation of pay status (Agency Hearing Exhibit 1). Mr. Kutschera stated that the appellant further did not comply with agency regulations which required employees to notify their supervisor on their first day of absence and every

seventh calendar day thereafter for the duration of such illness (Agency Hearing Exhibit 2). Mr. Kutschera also made reference to the appellant's failure to adhere to an agency regulation which required those employees on extended sick leave to file an application for leave at least at the end of each two week period (Agency Hearing Exhibit 2).

Mr. Kutschera stated that the appellant was placed on an approved leave status from June 16, 1983 through September 19, 1983, because he provided applications for leave and medical certification for a sprained wrist (Tab 3 of Agency File). Mr. Kutschera remarked that the appellant was marked in an unuathorized absence status from September 20, 1983 through March 6, 1984, because he did not provide medical certification or application for leave to cover his continued absence

during this time period. Mr. Kutschera made reference to the fact that he specifically informed the appellant that he was required to submit to him (Kutschera) written justification for his prolonged absence from work and to also notify Theresa McGowan, an Employee Relations Specialist, to explain the reasons for his prolonged absence (Agency Hearing Exhibit 3). Mr. Kutschera remarked that he sent the appellant a letter dated January 6, 1984, in which he advised the appellant that his absence from September 20, 1983, through January 6, 1984, was excessive and unauthorized making note of the fact that the appellant did not submit medical certification or any other written justification of the need for a continued prolonged absence (Tab 3 of Agency File). The letter directed the appellant to immediately contact Mr. Kutschera. The appellant did

contact Mr. Kutschera on January 10, 1984, and indicated that he wanted to come back to work (Tab 3 of Agency File). Mr. Kutschera related that he directed the appellant to provide: medical certification that he would be able to resume full duty in 4 months; his restrictions during those 4 months if he was permitted to return to work; justification for his illness; and permission by a physician that he was able to return to work. Mr. Kuschera related that the appellant failed to furnish him with any of the requested documentation.

Linda Shay, a Supervisory Personnel Assistant, testified that on September 12, 1983, the appellant reported to her office and indicated that he would like to come back to work in a light duty status. The appellant presented Ms. Shay with a note from Marc Zimmerman, M.D., which indicated

that the appellant was recommended for light duty status (Joint Hearing Exhibit 1). Ms. Shay testified that she informed the appellant that light duty was available, but in order to place him in light duty status he would have to provide a list of his medical restrictions so that his duties could be appropriately structured. Ms. Shay inidcated that the appellant told her that he would bring in the medical restrictions by September 19, 1983, but that the appellant did not comply with her request as he failed to provide any job restrictions to her.

The appellant contends that he was absent from work due to injuries he sustained in an on-the-job accident in 1983. The appellant contends that he compled with agency procedures in reporting his absences and contacted the agency frequently in regard to his work status. The

appellant testified that on June 1, 1983, he injured himself at work when he lost his balance and fell down a flight of stairs. The appellant contends that he received abrasions on his knees, elbows and wrists, and suffered pain in his right wrist. The appellant testified that he was placed on a continuation of pay status from June 2, 1983 through July 16, 1983. However, I find that the appellant did not actually receive benefits for more than 7 days since the Department of Labor in a Compensation Order (Tab 3 of Agency File, Page, 16) denied compensation benefits to the appellant after June 9, 1983, due to the fact that no medical evaluation was submitted between June 10, 1983, and July 16, 1983. The appellant stated that his wife contacted Ms. Shay on August 31, 1983, about his returning on light duty and Ms. Shay again refused this request. The appellant made reference to his

submitting a note from his physician Marc Zimmerman, M.D., which recommended that the appellant be placed on light duty at that time (Joint Hearing Exhibit 1). The appellant remarked that he also visited Ms. McGowan of Personnel prior to August 10, 1983, and that she gave him leave slips to cover his absences. The appellant indicated that he completed the leave slips and his leave was approved for his absences from July 16, to September 19, 1983. The appellant remarked that he submitted form CA-20 to the U.S. Department of Labor stating that he was available for light duty from August 1, 1983, and listed his work limitations. Helen Donald, a Claims Examiner with the U.S. Department of Labor confirmed in a memorandum dated December 22, 1983, that the appellant did submit this form (Tab 3 of Agency File, Page 18). The appellant related that on January 10, 1984, he

visited Mr. Kutschera and told him that he was ready to return to work but Mr. Kutschera would not allow him to return to work. The appellant related that he took a doctor's note dated January 17, 1984, to an unidentified gentleman in Personnel (Appellant's Hearing Exhibit 1) in which Marc Zimmerman, M.D., stated that the appellant was ready to return to full duty. The appellant, however, failed to furnish evidence of the name of the individual to whom this note was given or that Personnel actually received this note.

Based upon the evidence above, I find that the appellant was in fact absent from work from June 10 through July 15, 1983, and from September 20, 1983 through March 6, 1984. I find that the agency had specific procedures for requesting leave and substantiating medical illness. The

appellant claims that he was not aware of these procedures. I, however, find that the appellant did comply with agency procedures in requesting and documenting leave as he provided applications for leave and medical documentation of his illness for the period between July 16, 1983 and September 19, 1983, for which he was granted approved leave. I, therefore, find that the appellant is less that candid in his claim that he was not aware of such procedures. Weaver v. Department of the Navy, 2 MSPB 297 (1980). I find that the appellant failed to properly request leave and to substantiate his injuries in accordance with agency procedures during the time periods in question. The appellant just contacted agency officials without providing medical evidence in support of his claimed injuries. As far as the appellant's claim that he was available for light duty, I

find that the appellant did not provide his medical restrictions to the agency after being instructed to do so by Mr. Kutschera and Ms. Shay. The evidence of record reveals that the appellant just provided these restrictions to the Department of Labor. The agency was, therefore, not in a position to structure appropriate light duty assignments for the appellant. In regard to the January 17, 1984, medical note, which indicated that the appellant was fit for full duty, I find that the medical certificate was not provided to Mr. Kutschera. The appellant admitted at the hearing that he did not give the medical note to Mr. Kutschera. I find that even though the appelant claims that he provided the note to a gentleman in Personnel, he could not name the individual nor did he prove that Personnel ever received the medical note. It is reasonable to presume that if the note was

received in Personnel it would have been forwarded in the normal course of business to Mr. Kutschera to notify him that the appellant was fit for duty. Evidence has not been furnished in support of such a notification. Under these circumstances I cannot find that the medical note was furnished to the Personnel Service. See Weaver, supra. Accordingly, I find the charges of excessive unauthorized absence and failure to properly notify the agency of the reasons for such absence sustained by a preponderance of the evidence.

The appellant claims that he has been the victim of disparate penalties in that other employees have committed similar offenses and have not been removed from their positions. Under Douglas v. Veterans Administration, 5 MSPB 313 (1981), employees should be given like penalties for like offenses. To prove

this claim, the appellant must show that the disparate actions were based on substantially the same facts; Fuiava v. Department of Justice, 3 MSPB 217 (1980); and the number and nature of charges was substanitally the same; Greene v. Department of Health and Human Services, 3 MSPB 459 (1980) and Miller v. Department of the Navy, 4 MSPB 353 (1980). The appellant contends that there are certain employees at the agency who only received letters of reprimand for excessive unauthorized absence, whereas he has been removed from his position. Mr. Kutschera testifed that some employees at the agency who have committed the offense of excessive unauthorized absence have been removed from their positions while others have received letters of reprimand or other penalties. Mr. Kutschera testifed that those employees, who received a letter of reprimand were given a lesser penalty than

removal because they complied with requests to return to work with documentation to cover their absences. Mr. Kutschera indicated that some of these employees were given less than removals on their second or third offense. Mr. Kutschera, however, distinguished these cases where the employee received a penalty less than removal with the appellant's case because the appellant did not comply with a request to return to work or provide documentation to cover his absences. Mr. Kutschera testified that the appellant probably would not have been removed from his position if he returned to work with documentation to cover his absences. I find that no valid comparison can be made between the lesser penalties given to other employees with the penalty of removal given to the appellant since in those cases where employees were given lesser penalty than removal there were

mitigating circumstances, discussed above, which were not present in the appellant's case. Thus, I find that the appellant has failed to prove any type of case of disparate treatment based on like penalties for like offenses.

The next issue for consideration is whether appellant's removal promotes the efficiency of the service in accordance with 5 U.S.C. §7513(a). See Phillips v. Bergland, 586 F.2d 1007, 1010-11 (4th Cir. 1978); Young v. Hampton, 568 F.2d 1253, 1257 (7th Cir. 1977); Allen v. United States Postal Service, 2 MSPB 582 (1980); Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

As discussed above, I sustained the charge of the appellant's unauthorized absence from duty. In general, "unauthorized

absence from duty has been held to be proper grounds for removal since by its very nature it disrupts the efficiency of the service." Desiderio v. Department of the Navy, 4 MSPB 171 (1980); Kamer v. Department of the Navy, 6 MSPB 163 (1981); Dornan v. Internal Revenue Service, 7 MSPB 499 (1981); and Chiriaca v. United States, 235 F. Supp. 850 (N.D. Ala. 1963), aff'd, 339 F.2d 588 (5th Cir. 1964). The Board has recognized in McKenzie v. United States Postal Service, 1 MSPB 480 (1980) that removal for prolonged absence is a just cause for removal. Rubin v. United States, 150 Ct. Cl. 28 (1960); Chiaverini v. United States, 157 Ct. Cl. 371 (1962); and Bond v. Vance, 327 F.2d 901 (D.C. Cir. 1964) stand in support of the proposition that Federal employees can be removed for a prolonged absence. Accordingly, I find that appellant's removal for charges of

AWOL is warranted to promote the efficiency of the service in accordance with 5 U.S.C. § 7513(a).

Whether or not the appellant's misconduct was serious enough to warrant dismissal must be determined by reviewing a number of factors: (1) the nature and seriousness of the offense; (2) the employee's job level and type of employment; (3) the employee's past work record, including length of service; (4) the employee's past disciplinary record; (5) the consistency of the penalty imposed; (6) the clarity with which the employee was on notice of any rules that he violated, or had been warned about the conduct in question; (7) the potential for the employee's rehabilitation; and (8) and mitigating cirucumstances; see Douglas v. Veteran's Admini-

stration, 5 MSPB 313 (1981) and Howard v. United States, Civil Action File No. CIV-LV-77-219 (D. Nev., July 3, 1980).

The appellant contends that the penalty of removal is too harsh a penalty in light of his five years of satisfactory government service and his having no prior disciplinary record.

With respect to the severity of the penalty, the agency provided the schedule of disciplinary offenses and penalties (Tab 1 of Agency File). According to the schedule, I find that a penalty of removal can be imposed for a first offense of Excessive Unauthorized Absence. Accordingly, I find that the agency complied with its table of penalties in imposing the penalty of removal.

The agency takes the position that the extended period in which the appellant was AWOL caused it hardship because the appellant's duties had to be assigned to others. Mr. Kutschera testified to this effect. The agency maintains that it cannot tolerate employees who show lack of dependability by being absent from work over an extended period of time since this has a detrimental effect upon the agecny in carrying out its mission. The appellant by being absent for 6 months resulted in there being one less machine tool operator to perform duties. I find that the appellant's not being at work for such a prolonged period of time would indeed have an adverse impact upon the mission of the agency. The agency expressed the opinion that the penalty of removal was the only penalty that could serve to correct the action. The agency also takes the position that the penalty of removal

is warranted because the appellant failed to properly notify the shop for his reason for absence. Accordingly, I find that the agency did not abuse its discretion or act in an arbitrary, capricious or unreasonable manner in imposing the penalty of removal. I find that the removal penalty is a reasonable penalty in the instant case.

DECISION

The agency action is affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on OCT 25 1984 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections to the initital decision, supported by references to applicalbe laws or regulation, and with specific reference to the record. The petition for review must be filed with the Clerk of the Board, Merit Systems Protection Board, Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

> (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulations.

The appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439. The petition for judicial review must be received by Court no later than thirty (30) days after the appellant's receipt of the Board's final decision.

For the Board:

_____

Frederick L. Fishman

Presiding Official

CROSS-EXAMINATION

BY MR. BADEY

Q It's your testimony today, Ms. Shay, that the proper procedure for returning to work at a light duty status is to bring a medical report, a list of restrictions from the doctor, to your office before going back to work.

A Yes, sir.

Q And then that's the first step, right, and then from there where do you send him?

A Depending upon what the -- if the person is light duty and is given restrictions we contact the contact general foreman of each shop to see if work is available within those restrictions. If they have no work within those restrictions I contact our Code 302, the administrative officer for the production department, for light duty assignment in another department within the shipyard.

Q How many people work under you in your office?

A 18.

Q Would it be fair to say, Ms. Shay, that at times it's difficult to get directly to you, to you personnally, by phone due to the large number of people in your office and the busy nature of your activities?

A No. it's not difficult.

Q So, you're always reachable.

A Yes.

BY MR. BADEY:

Q You said that you can't give out light duty. Who gives out light duty?

A You can assign light duty as directed by the shipyard dispensary.

Q And, who else has to approve the application of light duty other than yourself or the dispensary? Would he have to go through personnel?

A If we have light duty available we assign it in the shop, foreman level.

Q But, before someone could get light duty they would have to go to personnel with adequate verification from a doctor or the dispensary and then personnel would send him to a shop, your shop maybe, to assign light duty. Isn't that the procedure normally?

A No. No. The situation -- if he goes to the dispensary -- reports for work, goes to the dispensary, says light duty, the man is injured on the job, he is

returning to work light duty. Say he gets injured that day and is back to light duty. We can assign light duty without personnel.

Q So, it would have been your job to do that. And, you stated earlier that you could not assign light duty. Is that correct?

A I did not.

Q All right. Did you assign light duty to Mr. Ferry?

A I was never given the opportunity.

Q Could the shops under your -- I think you're in charge of many shops. Is that correct?

A Many buildings, yes.

Q Many buildings. Would any of the buildings or shops under you have direct authority to assign light duty?

A If Mr. Ferry the day of his injury came back, said light duty, he would be assigned light duty.

Q He would have to report to his immediate superviosr.

A Right.

Q And, his immediate supervisor would then refer him to personnel?

A No. We would assign him light duty.

which went into effect in October.

This was a fact, supported without any question(?), he looked at the document which they did produce, which was effective in October, which, by the way, covered the bulk of the period of time Mr. Ferry was out of work.

And looking at the (iaudible) the Agency (inaudible) the determination that this regulation was, indeed, in effect during the entire period of time, when there was a regulation in effect similar to the doctor's were submitted during the time that Mr. Ferry first had his accident, so --

THE COURT: Did I understand you to say in the beginning, your answer to Judge Bennett's question, that the Agency couldn't find a copy of the regulation?

MR. JAMES: Apparently they could not find --

THE COURT: Well, how -- if the Agency itself couldn't find it, how is Mr. Ferry supposed to be aware of it?

MR. JAMES: Well, your Honor, there was no question of anybody in the Agency being aware of it. They simply -- and I cannot give you the explanation whay the document was not produced; however, apparently, the most current document that could be obtained was in effect in October. And I can't decide (?) that the bulk of Mr. Ferry's absence was during the period of time when the document which he submitted(?) was in effect.

PRESIDING OFFICIAL: Okay. Let's have the stipulations read into the record.

MR. BADEY: We have stipulations on the first category, stipulations of procedural fact since the hearing of August 3, 1984; and both parties stipulate A. Presiding Offical Fredrick Fisher issued a decision dated September 20, 1984, affirming the Agency action of removal. B. Appellant, thereafter, filed a prompt and timely Petition for Review with the Merit Systems Protection Board hereafter now called the MSPB. C. The MSPB denied the Appellant's Petition for Review without opinion on January 15, 1985. D. The Appellant thereafter filed a prompt and timely appeal with the U.S. Court of Appeals for the Federal Circuit. E. Appellant's brief was filed in a timely fashion May 20, 1985. F. The U.S. Justice Department representing the Department of the Navy before the Federal

Circuit, after obtaining court approval filed a brief on behalf of the Agency. After the original due date, they filed their brief on August 14, 1985. And their Motion for an Enlargement of Time with the filed brief has been marked and admitted as Joint Hearing Exhibit Number 1. G. The Appellant, with the consent of the Justice Department and the Court and in the interest of settling the case, obtained an extension of time within which to file his reply brief before the Federal Circuit. The brief was filed on September 25, 1985, after the Justice Department indicated that they had no Agency authorization to settle the case. And we have marked and admitted into evidence as Joint Hearing Exhibit Number 2, the Appellant motions for enlargement of time before the Federal Circuit when he filed the reply brief. H. Oral argument was held on October 10, 1985, in Washington, D.C.

before the Federal Circuit on this case. The U.S. Court of Appeals to the Federal Circuit in a decision and an order dated October 29, 1985, vacated the decision of the MSPB and remanded the case for the reason stated therein. Joint Hearing Exhibit Number 3 contains a judgment, the order, the decision of the Federal Circuit as referred to previously.

That was Stipulation Number 1 in total.

PRESIDING OFFICIAL: Yeah, Ms. Kleen, do you so stipulate?

MS. KLEEN: Yes, sir.

MR. BADEY: Stipulation Number 2. The parties stipulate that the decision of Edward Daniels, the Hearing Representative of the U.S. Department of Labor, dated August 7, 1985, and marked as part of Joint Exhibit Number 4 fully explains the

events which occur in the Department of Labor case concerning the Appellant's work injury of June 1, 1983.

PRESIDING OFFICIAL: Respondent, do you so stipulate?

MS. KLEEN: Yes, I do.

MR. BADEY: Number 3. The parties stipulate that the imposition of an 8-day suspension followed by reinstatement of Appellant to his former position with the Philadelphia Naval Shipyard is warranted and promotes the efficiency of the service.

PRESIDING OFFICIAL: Ms. Kleen, do you so stipulate?

MS. KLEEN: Yes, I do.

MR. BADEY: Number 4. The parties stipulate that the issue of whether the Appellant vilated any rule in effect prior to October 20, 1983, should be withdrawn from consideration in this case.

PRESIDING OFFICIAL: Ms. Kleen, do you so stipulate?

MS. KLEEN: Yes, I do.

MR. BADEY: Number 5. The parties stipulate that the only issue they want the Presiding Official to decide is the appropriateness of penalties. The Agency is now proposing an 8-day suspension with reinstatment of the Appellant to his former job. The Appellant is not contesting this Agency action.

PRESIDING OFFICIAL: Ms. Kleen, do you so stipulate?

MS. KLEEN: Yes, I do.

MR. BADEY: Number 6. The parties stipulate that if called to testify, the Appellant would testify in accordance with the document entiteld, "Stipulated Testimony of Appellant, Jospeh P. Ferry" and which has been marked as Joint Hearing Exhibit Number 5 and entered into evidence.

PRESIDING OFFICIAL: Ms. Kleen, do you so stipulate?

MS. KLEEN: Yes, I do.

MR. BADEY: Number 7. The parties stipulate that if called to testify, both John Puchera (phonetic) and Linda Shedy (phonetic), would testify that in this particular case, an 8-day suspension rather than removal, is an appropriate penalty for the following reasons.

Now this is the sub-paragraph that they give as reasons. A. Appellant failed to return to Mr. Puchera in January, 1984, after Mr. Puchera was requested orally and by letter to bring in a list of his medical restrictions to Mr. Puchera. B. The decision of the U.S. Department of Labor hearing representative, previously discussed and marked as Exhibit Number 4, indicated that Appellant was disabled for the period June 2, 1983, to January 23, 1984. Therefore, in light

of this decision, the Agency can no longer consider Appellant AWOL, absent without leave, during any other said period. C. At the time of Appellant's removal in April, 1984, the Agency considered its decision to remove the Appellant reasonable and justified based on the information available to it at the time. In the Department of Labor decision, which has been marked and entered into evidence as Exhibit 4, had been available to the Agency at the time disciplinary action was proposed in March, 1984, and carried out through April, 1984, the Agency would have considered the charge of absence without leave from January 23, 1984, to March 6, 1984. And the charge of failure to properly notify his shop of his reasons for that action as basis for the disciplinary act. D. The Appellant had no prior disciplinary record. E. The Appellant had a record of performance

evaluations in his prior tenure with the shipyards, none of which were below satisfactory. F. Appellant failed to respond to the notice of proposed removal dated March 6, 1984. G. Appellant failed to contact anyone at the shipyards during the period of January 10, 1984, until after he was removed. H. That there are other cases at the Philadelphia Naval Shipyard where other workers were given penalties similar to the 8-day suspension proposed herein when similar circumstances existed. I. An 8-day suspension will permit the Appellant to return to the work force shortly and in light of his prior work record, his skills on the job will promote the efficiency of the service. J. That an 8-day suspension will deter the Appellant from violating shipyard procedures in the future. K. The Federal Personnel Manual, Capter 751, sub-Chapter 1-2, C-2, indicates that "any disciplinary

action demands the exercise of responsible judgment so that an employee will be penalized out of proportion to the character of the offense. This is particularly true of an employee who has a previous record of completely satisfactory service" L. The offense does not appear to the Agency to have been committed maliciously or for gain. M. The 8-day suspension is within the applicable agency table of penalties.

And that concludes what we have agreed, Mr. Puchera and Ms. Shedy would have testified to had they been here, which is Stipulation Number 7.

PRESIDING OFFICIAL: Ms. Kleen, do you so stipulate?

MS. KLEEN: Yes, I do.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. FERRY	:	
	:	Docket No.
	:	PH07528410405
v.	:	
	:	
DEPARTMENT OF	:	
THE NAVY	:	

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STIPULATED TESTIMONY OF

APPELLANT JOSEPH P. FERRY

If called to testify, Joseph P. Ferry would testify as follows:

"Throughout the course of events from when I was initially injured in June of 1983 through the present, I feel that I have complied in good faith with all regulations of the shipyard, and that I was not at fault nor committed any wrongful conduct. Since I was removed from the rolls of the Philadelphia Naval Shipyard I have personally, and through my attorney, continuously and vigorously pursued my appeals on the issues in a good faith attempt to regain my job as soon as possible. At this point, I will not contest an eight (8) day suspension only because I wish to return to work now, and that by not contesting the eight (8) day suspension, I will be reinstated and will begin working quite soon, as I have always wanted to do. My failure to contest this penalty is in no way an admission by me that I have done anything wrong, since I maintain that I have done nothing wrong

throughout this entire period of time. Further, it should not be construed as a waiver of any other rights I may have under applicable law.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

JOSEPH P. FERRY, Appellant	:	Initial Decision No. PH07528410405-1
v.	:	
DEPARTMENT OF THE NAVY, Agency	:	

MOTION FOR ATTORNEYS' FEES

1. On March 6, 1984, the agency proposed that the appellant be removed from his position as a machine tool operator with the Philadelphia Naval Shipyard.

2. On April 30, 1984, this action became final.

3. Thereafter, the appellant contacted the undersigned counsel to provide him representation to contest the agency action.

4. Thereafter, the undersigned counsel provided representation and performed services in accordance with the attached fee schedule.

5. As a result of counsel's actions on behalf of the appellant, on October 29, 1985, the United States Court of Appeals for the Federal Circuit vacated and remanded the case to the MSPB, not only on new evidence regarding workers' compensation benefits, but also on the appellant's contention that the Agency did not produce the appropriate regulation at the hearing on August 3, 1984. This issue was preserved for appellate review through appropriate objections at the August 3, 1984 hearing and thereafter through Petitions for Review filed with both the full MSPB and the Federal Circuit. As such, counsel's services throughout the pendancy of this matter proved to be fruitful, and eventually successful.

6. On March 17, 1986, the MSPB Presiding Official reversed the agency's removal action, and instead, imposed an eight (8) day suspension, and awarded full back pay and benefits to the appellant, which amounts to almost two (2) years of back pay and benefits.

7. In light of the above ruling, the appellant is considered the "prevailing party".

8. The result in the instant case was justified based on the evidence brought to light by counsel for the appellant, and through counsel's efforts.

9. An award of attorneys' fees as contained in the attached fee petition is in the interests of justice, and in accordance with 5 U.S.C. §7701(g)(1), as well as the Equal Access to Justice Act, 42 U.S.C. §1988.

10. At no time has the appellant herein acted in bad faith nor has he committed or admitted committing an infraction of regulations which would warrant his removal. Furthermore, appellant's stipulated testimony was entered into the record at the hearing held on February 28, 1986, and this further supports an award of attorney's fees as in the interests of justice.

11. In Allen v. U.S. Postal Service, 2 MSPB 582 (1980), the MSPB set standards governing the award of counsel fees. In the instant case, the agency at the outset committed gross procedural errors of the type cited in Allen which greatly prolonged the proceeding.

A. The agency never introduced the regulation which the appellant allegedly violated, and they never requested information from the Departmenmt

of Labor regarding the appellant which would have obviated the necessity for the disciplinary action.

B. Thereafter, the agency persisted in unnecessarily prolonging the proceeding before both the full MSPB and later the Federal Circuit.

C. The agency's answer to the appellant's Petition for Review and the appellant's reply thereto points out the unreasonable position of the agency, which then necessitated the appeal to the Federal Circuit.

D. Lastly, and perhaps most unreasonably, was the refusal of the agency to agree to settle the case after the Department of Labor decision was released in August of 1985. In fact, at the oral argument held before the Federal Circuit in Washington D.C. on October 10,

1985, the representative of the agency continued to vehemently argue that the appellant should be removed.

12. In addition, the agency has also indicated that notwithstanding the order of the presiding official, they will not pay any back pay or benefits. This issue will soon be the subject of a Petition for Enforcement, but again, the agency's action is in bad faith. Under normal circumstances, counsel would expect that the fee would be paid by the appellant, deducted out of the rather sizable back pay award, and then, if the fee petition were successful, the appellant would be reimbursed. However, in the instant case, the agency is even attempting to circumvent the decision of the presiding official, and thereby, make difficult, if not impossible for counsel to collect a reasonable fee.

13. Now, most recently, in their most blatant display of bad faith, the agency is now refusing to give the appellant his pay check for hours worked over the past few weeks. The appellant was restored to his position and began working on March 28, 1986. Since that time, the agency has refused to pay him purportedly based on the fact that the appellant owes the agency several thousand dollars in continuation of pay benefits which were "controverted" by the Department of Labor. Notwithstanding the fact that counsel as well as Mr. Campbell's office have been aware for many months that the appellant was successful in his workers' compensation action and the appellant therefore owes nothing to the agency, the comptroller's office at the agency persists in refusing to pay even his wages. It appears that the agency wants the appellant to "work off" his "debt" before they

begin paying him his regular wages. Telephone calls have been made by undersigned counsel to counsel for the agency as well as to Mr. Campbell's office and comptroller's office, but to no avail. Surely this is yet another outrageous example of the agency's bad faith in this matter.

14. All of the above evidence should be considered by the presiding official and lead to the conclusion that an award of attorney's fees for counsel's efforts throughout the case is in the interests of justice.

15. The fees requested in the attached fee schedule are reasonable and are warranted in the interest of justice.

WHEREFORE, appellant respectfully requests the Presiding Official to award attorneys' fees in accordance with the attached schedule.

Respectfully submitted,

STEPHEN A. SHELLER &
ASSOCIATES

BY:_____
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(215) 546-5510

Attorneys for Appellant

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. FERRY	:	[Merit Systems Protection Board Docket No. PH075284A0405]
v.	:	
DEPARTMENT OF THE NAVY	:	

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APPELLANT'S PETITION FOR REVIEW ON THE APPELLANTS PETITION FOR ATTORNEYS' FEES

Appellant, Joseph P. Ferry, hereby petitions the Merit Systems Protection Board for review of the decision of Presiding Official Frederick L. Fishman in the instant case, pertaining to the appellant's Motion for Attorneys' Fees, and in support thereof, avers that the decision of the Presiding Official is based on erroneous interpretation of statute or regulations.

The instant case has a long and convoluted history as is evidenced by the extreme amount of time and hearings, documents, and decisions invested in this case by both parties and the adjudicating bodies. Initially, the decision of the Agency was appealed to Mr. Fishman, who affirmed the Agency's recommendation to remove Mr. Ferry. Thereafter, a Petition for Review was filed with the MSPB, who also affirmed Mr. Ferry's removal. Thereafter, the appellant appealed the case to the Unites States Court of Appeals for the Federal Circuit. In its opinion, the Court vacated the appellant's removal and remanded the case back to the MSPB for further consideration. It is absolutely imperative to note that there were <u>two</u> reasons for the Court's decision. First, the Court indicated that as a result of an intervening Department of Labor decision, which found the appellant disabled from

working for most of the period for with he had been charged with being AWOL, that the Board should reconsider its position. Secondly, and perhaps more importantly, since this area was completely neglected by Mr. Fishman in his decision to deny attorneys' fees, the Court remanded the case on the issue of whether there were any official regulations in effect at the time Mr. Ferry was alleged to have violated them. Attached to this Petition for Review as Exhibit "1" is a copy of the transcript of the argument before the Federal Circuit Court of Appeals. Please note that even at the argument in Washington DC, counsel for the Agency could not produce for the Court any regulations in effect at that time the appellant was alleged to have violated them. The Agency later agreed to withdraw this issue from consideration by the Presiding Official at the remand hearing. A critical misinter-

pretation occurs here by Mr. Fishman however. He states, at page 5 of his decision, as follows:

> "The appellant's assertion that he should be awarded attorneys' fees based on the Agency's having committed harmful procedural error is without basis. In my decision I did not find that the Agency committed any procedural errors. As pertains to appellant's argument that he should be awarded attorneys' fees because there has been no showing that he violated any Agency regulation, I find that both sides stipulated at the February 28, 1986 hearing that this issue should be withdrawn from my consideration of the case. Accordingly, I find that this matter does not establish a basis for allowance of attorneys' fees."

It is respectfully submitted by the appellant herein that Mr. Fishman entirely missed the point on this issue. Of course, if the Agency was willing to stipulate to withdraw the issue of whether the appellant violated any regulations from consideration, why indeed would the appellant object. To the contrary, the appellant would welcome such a stipulation

and gladly agree to it. This does not remove the fact that the appellant had been dragged through the appeals process for over two years with "violtion of a regulation" being one of the primary bases for the Agency's action. The Agency's agreement to withdraw this issue from consideration (with the obvious approval by the appellant), evidences a clear and gross procedural error on the part of the Agency, since at no time in this case have they ever introduced a regulation which was allegedly violated by the appellant.

Clearly, the Agency's action, in charging the appellant with a violation of a regulation which it has never, even to this date, introduced into evidence, was a charade "clearly without merit", and "wholly unfounded". (Section 7701(g)(1)). Furthemore, since the Agency agreed to withdraw the issue of whether the appellant violated any regulations, it must

necessarily then be said that he was in fact "substantially innocent" of those charges. Again, Mr. Fishman completely neglected to address this issue, and instead made a finding that simply because the appellant agreed that the issue should be withdrawn from consideration, that it then must be disregarded even for attorneys' fees purposes.

It should be noted that in reviewing the Court of Appeals transcript, the Judges were certainly upset with counsel for the Agency, since even at that high level and that late stage in the litigation, the Agency was still unable to produce the "regulations" with which the appellant was being charged with violating. (Page 26 Notes of Testimony 10/10/85).

In sum then, the "regulations" with which Mr. Ferry was alleged to have violated have never, to this date, been

produced by the Agency. This was a substantial ground upon which the Federal Court of Appeals relied in vacating and remanding the case. The additional ground they relied upon was the intervening workers' compensation decision which exonerated a large period of Mr. Ferry's alleged absences.

In addition, the Agency did indeed commit "gross procedural errors" which clearly prolonged the proceeding and severely prejudiced Mr. Ferry. In this regard, a brief perusal of the Court of Appeals' argument indicates that the Agency was well aware of the case law on the subject, and that indeed, as a result of the workers' compensation decision, and the lack of applicable regulations, Mr. Ferry was sure to be reinstated. Notwithstanding this, they continued to argue the

case, albeit in an irrational manner, (see argument), that the removal should still apply.

Finally, immediately prior to the remand hearing, the Agency agreed to stipulate to an 8 day suspension as being an appropriate penalty. In light of the fact that Mr. Ferry had been out of work for over two years at that point, he was glad to be able to return to work and readily stipulated to this. However, Mr. Ferry at no time admitted any wrongdoing. Attached hereto and marked as Exhibit 2, is a copy of an Affidavit submitted at the remand hearing by the appellant, which outlines the appellant's position with regard to stipulations made at the hearing.

In light of the law as it stood, as of August 1985 after the workers' compensation decision was rendered, the Agency "knew or should have known that it would

not prevail on the merits" of a removal action. It did not prevail, and therefore, the appellant is entitled to be awarded attorneys' fees.

Mr. Fishman simply neglects to note the procedural errors and bad faith exhibited throughout this case by the Agency. Their sheer lack of "regulations" with which they charged him evidences their bad faith.

In sum then, Mr. Ferry was originally removed, and after waging a two and half year battle which included an appeal to the U.S. Court of Appeals for the Federal Circuit and over $16,000.00 in legal fees, which eventually had him reinstated with a minimal penalty, Mr. Fishman contends that Mr. Ferry should be forced to pay the $16,000.00 in fees himself. Mr. Ferry's yearly take home wage at the Shipyard is less than his attorneys' fees that are owed at this point. The purpose of the

statute was to award fees in the "interest of justice" and clearly not to impose these costs upon an appellant who is least able to pay, even after he has prevailed in his action and demonstrated the bad faith of the Agency.

As the Board is surely aware, the numerous appeals, briefs, arguments, and hearings in this case certainly would take a great deal of time and effort on counsel's behalf, and therefore, for all of the foregoing reasons, the appellant's Motion for Attorneys' Fees should be granted.

Respectfully submitted,

STEPHEN A. SHELLER & ASSOCIATES

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH P. FERRY Appellant	:	
v.	:	MSPB Docket No. PH075284A0405]
DEPARTMENT OF THE NAVY Agency:	:	

AGENCY OPPOSTION TO PETITION FOR REVIEW

On September 15, 1986, the agency received appellant's petition for review of the Administrative Judge's decision of August 13, 1986, denying his motion for attorney fees. The agency requests that the Board deny appellant's petition, for failing to meet the requirements for a proper review found at 5 C.F.R. § 1201.115.

Appellant's petition contains the very same arguments previously raised in his motion for attorney fees, filed with the

Board on April 29, 1986, which were in turn considered by the Administrative Judge in his Initial Decision. Having made no claim of any "new" or "material" evidence, appellant has limited his argument to the contention that the Administrative Judge made erroneous interpretations of statutes or regulations. 5 C.F.R. §1201.115(b). According to Board case law, there must be enough specified in the petition to enable the Board to detemine whether there exists "a serious evidentiary question justifying a complete review of the record." Weaver v. Dept. of the Navy, 80 FMSR 7012 (May 20, 1980). Mere conclusionary allegations of factual error (without more) are insufficient. Id. Appellant's petition for review consists entirely of such conclusory allegations and therefore, falls far short of the required showing for Board review.

Appellant argues that since the agency never produced the regulation which he was charged with violating, he was needlessly dragged through proceedings before the Board and the Federal Circuit, the disciplinary action was "clearly without merit" and "wholly unfounded" and the agency action amounts to gross procedural error. He further contends this action was one it should have known would be reversed when the Department of Labor reversed its earlier decision disallowing his claim for compensation payments. Appellant seeks to demonstrate his claim for attorney fees are warranted under the interest of justice standard. Allen v. United States Postal Service, 2 MSPB 582 (1980).

Appellant has, for purposes of seeking attorney fees in this case, lost track of the fact that he was AWOL during the

period January 24, 1984 through March 6, 1984, he failed to notify his shop of the reason for his absences and never offered any evidence to justify or excuse this absence. The Administrative Judge correctly found these AWOL charges to be supported by the preponderance of the evidence and adopted the stipulation of the parties in determining that an eight day suspension was warranted and supports the efficiency of the service.

Appellant never challenged the Administrative Judge's factual findings regarding this six week AWOL period, although he clearly could have done so if he disagreed with them or felt they did not accurately reflect the stipulation of the parties. Appellant now claims he had never admitted any wrongdoing and attempts to explain his motive for entering into the stipulation. Such arguments have no

relevance to the Judge's determination. Moreover, it is now clearly improper to attempt to challenge, via this petition for review on the attorney fee issue, factual issues he was bound to raise on or before April 21, 1986, the date the Administrative Judge's findings became final.

Appellant has also conveniently ignored the plain meaning of the stipulation of the parties that the issue of whether an agency regulation was violated by his failing to notify his superiors was withdrawn by the parties. This is not tantamount to any admission of procedural wrongdoing as he now suggests. This stipulation merely freed the Judge to consider the entire record in the case without specific resort to a written instruction. The Judge has done this and properly concluded that, appellant has

prolonged the proceedings, improperly aided in the agency decision to remove him deliberately depriving the deciding official of essential information about his medical condition and was not substantially innocent of the charged serious offense. Wise v. MSPB, 780 F.2d 997 (Fed. Cir. 1985).

Appellant's Petition for Review consists entirely of mere conclusory allegations of factual error. He has failed to prove why the factual determinations he challenges are incorrect. Although he points to his Stipulated Testimony, at Exhibit B of his petition, he fails to explain why he never challenged the Administrative Judge's findings in this regard when he should have done so, on or before April 21, 1986. Moreover, he has never introduced any evidence

to justify or excuse his absence, or any proof to demonstrate that he ever notified his shop about these absences.

Although appellant claims that the Administrative Judge committed error on the issue of the procedural regulation, he has not shown how this error affected the outcome of this case. The procedural regulation, notwithstanding, the agency contends the Judge properly concluded that the appellant was guilty of the offense charged. His attachment of the Federal Circuit Transcript to support his contention that the agency could not produce its notification regulation and therefore committed gross procedural error totally ignores the opinion of the Federal Circuit Court about this very issue. The Federal Circuit stated, at page 3 of its order of October 19, 1985:

> We note that aside from whether there were regulations which petitioner violated, it is

> clear that petitioner was given direct instructions from his Shop superintendent that he must provide written justification and medical certification for his absences and the degree of his disability for resumption of work, but he did not do so. The Presiding Official so found and substantial evidence supports his finding.

When the Federal Circuit remanded the case on the issue of whether petitioner violated any regulations or procedure in effect prior to October 20, 1983, it added that qualifying language "and if not whether it makes any difference." By stipulationg that the issue of the regulation was no longer in effect, the Judge was free to properly make a decision based on that stipulation and the entire record of this case including the transcript of the hearing held on August 3, 1984. By affirming his previous findings with respect to the AWOL of January 24, 1984 through March 6, 1984, the Administrative Judge has answered the question

of the Federal Circuit. The removal, of the issue about whether appellant violated a regulation in effect prior to October 20, 1983, makes no difference in determining that the preponderant evidence otherwise totally supports a finding that appellant committed the charged offense.

Appellant's claim of procedural error lacks any merit. His petition for review does not meet the standard set forth in 5 C.F.R. §1201.115 in that he has not shown the Administrative Judge's decision was based on erroneous interpretation of statute or regulation. For these reasons, the agency respectfully requests that the appellant's petition for review be denied.

Respectfully submitted,

_____

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Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-8

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH P. FERRY, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to attorney fees under the Equal Access to Justice Act for his attorney's services before the Merit Systems Protection Board.

2. Whether he is entitled to an award under 5 U.S.C. 7701(g)(1) for such services.

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In the Supreme Court of the United States

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No. 88-8

JOSEPH P. FERRY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the Merit Systems Protection Board's denial of attorney fees (Pet. App. 1-4) is unreported. The Administrative Judge's opinion denying fees (Pet. App. 7-20; 846 F.2d 78 (Table); 34 M.S.P.B. 362 (Table)) is also unreported, as is the Board's opinion denying a petition for review of that decision (Pet. App. 5-6). The opinion of the court of appeals at the merits stage (Pet. App. 42-47; 785 F.2d 322 (Table)) and the agency opinions on the merits (Pet. App. 21-28 (34 M.S.P.B. 362 (Table)) Pet. App. 29-40, 48-73 (26 M.S.P.B. 422)) are similarly unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1988, and the petition for a writ of certiorari was filed on Monday, June 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was removed from his position as Machine Tool Operator by the Department of the Navy on May 5, 1984, for excessive unauthorized absence and failure properly to notify his employer of the reasons for his absence (Pet. App. 29). Petitioner appealed the agency action to the Merit Systems Protection Board (MSPB), seeking to have the agency's decision overturned and to be retroactively restored to his former position (*id.* at 48). Before the presiding official, the agency presented evidence that petitioner was injured on the job on June 1, 1983, and that, although he provided the necessary leave applications and medical certifications for the period from his date of injury through September 19, 1983, he failed, despite agency requests that he do so, to submit such documentation for the period from September 20 until he returned to work on March 7, 1984 (*id.* at 52-56). The presiding official found the charges of excessive unauthorized absence and failure properly to notify the agency of the reasons for such absence sustained by a preponderance of the evidence and affirmed the agency action (*id.* at 63, 71). On January 15, 1985, the full MSPB denied petitioner's petition for review of this determination.

Petitioner petitioned the United States Court of Appeals for the Federal Circuit for review. In his reply brief, petitioner brought to the attention of the court a decision of the Department of Labor, issued subsequent to the Board decision, granting him disability until January 23, 1984,

when the Department of Labor concluded that he was medically qualified to resume full employment (Pet. App. 44). In a decision issued on October 29, 1985, the court vacated the MSPB's decision and remanded the case to the Board for reconsideration in light of the Labor Department's ruling (*id.* at 42-43). Also, while the court noted that it was clear that petitioner had been given direct instructions that he must provide written justification and medical certification for his absence, the court found it unclear whether formal regulations requiring such documentation were in effect at the pertinent time (*id.* at 45-46). The court accordingly instructed the Board to determine the effect, if any, of the uncertainty about the status of the regulations (*id.* at 46).

On remand, the parties stipulated that, in light of the new Department of Labor decision, petitioner was not absent without leave during the period before January 23, 1984, and, consequently, the presiding official found this part of the charges not to be sustained (Pet. App. 32). The presiding official, however, sustained the charges that petitioner was absent without leave from January 24, 1984, through March 6, 1984, and had failed to notify his employer of the reasons for his absence (*id.* at 32-33). The issue of whether petitioner violated official regulations was withdrawn from consideration by stipulation, so the presiding official did not discuss it (*id.* at 33). Pursuant to a further stipulation of the parties, the Board substituted an eight-day suspension for the removal action (*id.* at 34-37).

2. Petitioner submitted a motion to the MSPB for attorney fees for work before the agency and in the court of appeals, relying primarily on 5 U.S.C. 7701(g)(1), and also mentioning the Equal Access to Justice Act (EAJA) (Pet.

App. 95).[1] The presiding official denied the motion (*id.* at 7-20). Applying the standards adopted by the MSPB in *Allen* v. *United States Postal Service,* 2 M.S.P.B. 582 (1980), he concluded that an attorney fee award would not be in the interest of justice, the criterion for an award under 5 U.S.C. 7701(g)(1).

The presiding official noted (Pet. App. 12) that under *Allen,* a "substantially innocent" prevailing party is entitled to a fee award (2 M.S.P.B. at 593), but since petitioner's intentional failure to supply the agency with the medical information it requested resulted in a removal decision made without "full knowledge of the relevant facts" (Pet. App. 16), he was not substantially innocent. See *Wise* v. *MSPB,* 780 F.2d 997 (Fed. Cir. 1985).[2] The presiding official further concluded that petitioner "committed a substantial offense and received [an] eight-day penalty. I cannot conclude from this record that the 'interest of justice' demands the agency now pay his attorney fees" (Pet. App. 19).

The MSPB denied a petition for review of the fee decision (Pet. App. 5-6), and the court of appeals affirmed (*id.* at 1-4). In the court of appeals petitioner did not assert any entitlement under EAJA, and that court accordingly considered only the applicability of 5 U.S.C. 7701(g)(1). The court concluded (Pet. App. 3) that petitioner's intentional

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[1] Although petitioner referred in passing to EAJA in his motion, which is reproduced in full at Pet. App. 93-101, the motion based the claim of entitlement on an asserted compliance with the standards governing an award under 5 U.S.C. 7701(g)(1). Indeed, petitioner even gave an incorrect statutory citation for EAJA.

[2] The presiding official also rejected petitioner's argument that attorney fees should be awarded (1) because the agency prolonged the proceedings after the Department of Labor finding, and (2) because the agency committed harmful procedural error in asserting a violation of agency regulation (Pet. App. 17-18).

refusal to provide his agency with the required documentation to justify his absence was "fatal to his claim of substantial innocence" and noted that "petitioner was not vindicated of the charge of AWOL. His suspension was for the efficiency of the service. Petitioner has so stipulated. This is too weak a reed on which to hang a claim for attorney fe[e]s in the interest of justice, especially absent any finding by the MSPB of bad faith or harmful procedural error in the suspension penalty on the part of the United States" (*id.* at 4).

ARGUMENT

1. Petitioner asserts that this case presents a conflict in the circuits over the extent of the applicability of EAJA to agency proceedings. Petitioner, however, failed to press his claim for EAJA fees before the agency, and totally failed to present it to the court of appeals. It would be inappropriate for this Court to consider that claim in the first instance. *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981); *United States* v. *Mendenhall,* 446 U.S. 544, 551 n.5 (1980).

In any event, petitioner would not be entitled to EAJA fees for work at the agency level under the plain terms of the statute, and the conflict he relies on, which is of no continuing importance, is not involved in this case. EAJA authorizes the award of attorney fees for work performed in agency "adversary adjudication," which is defined (5 U.S.C. (& Supp. IV) 504(c)) as an adjudication "under Section 554 of this title" (5 U.S.C. (& Supp. IV) 504); Sectino 554 in turn expressly excludes adjudications that involve the "tenure of an employee." There is thus clearly no authority under 5 U.S.C. 504 for the MSPB to award attorney fees for work performed at the agency level. *Gavette* v. *OPM,* 808 F.2d 1456, 1461 (Fed. Cir. 1986) (en banc); *Hoska* v. *Department of the Army,* 694 F.2d

270, 273 (D.C. Cir. 1982). There is a disagreement between the Federal and District of Columbia Circuits about the scope of *another* section of EAJA, 28 U.S.C. (& Supp. IV) 2412, which pertains to the award of attorney fees for work before the courts. Although the court in *Hoska* concluded that the "employee tenure" exception also bars the award of fees for services on judicial review of agency personnel decisions, the Federal Circuit disagrees. *Gavette* v. *OPM,* 808 F.2d at 1462-1463 (distinguishing between awards for work at agency level and in judicial proceedings).[3] That disagreement, however, is not of continuing significance since the Federal Circuit now has exclusive jurisdiction over all appeals from MSPB decisions in cases such as this one (28 U.S.C. 1295(9)). It is, in any event, not involved in this case, because petitioner's EAJA claim was at most solely for fees for his attorney's work at the agency level, not for fees incurred on judicial review.[4]

2. Petitioner's request for attorney fees was thus correctly considered only under 5 U.S.C. 7701(g)(1), which provides that the MSPB "may require payment by the agency involved of reasonable attorney fees incurred by an employee * * * if the employee * * * is the prevailing party

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[3] In *Miller* v. *United States,* 753 F.2d 270, 275 (3d Cir. 1985), the court, citing Section 2412, awarded fees for work performed before the MSPB. In a subsequent unpublished order (at 1) entered in that case on June 11, 1985, however, the court reconsidered the statutory basis for its award, and stated that its award "must be in accordance with the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), instead of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(3)." (We are filing a copy of this order with the Clerk of this Court.) Thus, the Third Circuit agrees that no EAJA fees may be awarded either by the court or the agency for work before the agency.

[4] Petitioner further suggests (Pet. 31-35) that the circuits are in conflict over the EAJA "substantial justification" standard. That conflict was resolved by this Court in *Pierce* v. *Underwood,* No. 86-1512 (June 27, 1988).

and the Board * * * determines that payment by the agency is warranted in the interest of justice." [5] This statutory standard clearly leaves wide discretion to the Board in determining when a fee is appropriate. Indeed, although the Senate Report on the Civil Service Reform Act of 1978, of which Section 7701 is a part, noted that fees were to be awarded when "the agency's action was taken in bad faith," as when the action is "wholly unfounded" or is designed "to harass" or "exert improper pressure" on the employee, that report also emphasized that "[t]he circumstances justifying the award of attorney's fees [are] left to the discretion of the Board to develop in light of its experience." S. Rep. 95-969, 95th Cong., 2d Sess. 61 (1978).

In *Allen* v. *United States Postal Service,* 2 M.S.P.B. at 592-593 (footnote omitted), the MSPB attempted to "provide prospective guidance by summarizing here circumstances * * * which may warrant fee awards," emphasizing that the summary was "not exhaustive, but illustrative. Nor is it a * * * litmus paper test[ ] for award or denial of attorney fees." [6] Following the Board's guidance in

[5] Attorney fees can also be awarded by an "appropriate authority" under the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii). The MSPB is such an authority, 5 C.F.R. 550.803, 550.806 (1986). The criteria for awarding attorney fees under 5 U.S.C. 5596 and 7701(g)(1) are identical. *Sims* v. *Department of the Navy,* 711 F.2d 1578 (Fed. Cir. 1983).

[6] The MSPB's summary of circumstances where fees should be awarded stated (2 M.S.P.B. at 593 (footnotes and citations omitted)):

> 1. Where the agency engaged in a "prohibited personnel practice";
>
> 2. Where the agency's action was "clearly without merit" or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;
>
> 3. Where the agency initiated the action against the employee in "bad faith," including:
>
> a. Where the agency's action was brought to "harass" the employee;

Allen—which the Federal Circuit approved in *Sterner* v. *Department of the Army*, 711 F.2d 1563 (1983)—the presiding official concluded that an attorney fee award to petitioner was not appropriate in the interest of justice. That decision is clearly correct. The substantial suspension penalty, to which petitioner stipulated, showed that the agency action was far from "wholly unfounded" or taken in bad faith. Nor was there anything approaching a "gross procedural error," "a prohibited personnel practice" or a proceeding brought where success on the merits was not to be anticipated. The MSPB found it unnecessary to review the presiding official's factbound decision, and the court of appeals affirmed. There is clearly no need for further review.

Petitioner asserts that the court of appeals erred in concluding that because petitioner was not substantially innocent, there was no need to consider any of the other bases upon which a fee award might be justified (Pet. 39-40). But petitioner's characterization of the court's decision is inaccurate; the court noted that petitioner had conceded that his suspension was proper, and that there was no showing of bad faith or harmful procedural error in imposing the suspension. Thus, the court did consider the other *Allen* factors. As petitioner himself notes, the Federal Circuit has not, in other cases, found the "substantial innocence" standard dispositive. It did not do so here.

Petitioner's alternative claim (Pet. 40-41) that the "substantial innocence" standard has not been consistently in-

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b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";

4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;

5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

terpreted reduces to the claim that in other cases involving different factual situations, employees have been found to be substantially innocent.[7] That is not sufficient to suggest that inconsistent standards are being applied.[8] In any event, petitioner's claim involves at most an inconsistency within the Federal Circuit in reviewing MSPB claims, which is a matter for that court, not this one, to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1988

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[7] Petitioner's summary of his situation (Pet. 44, 46-47) overlooks the fact that the administrative judge found that he "did not supply the requested medical information" (Pet. App. 16), and rejected his claim that he had supplied it to the agency personnel office (*id.* at 61-63).

[8] For the same reason, there is no merit in petitioner's suggestion that the Federal Circuit has been inconsistent in determining when agency charges are groundless and when an agency knew or should have known it would not prevail on the merits (Pet. 49-56).

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